Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Special Access Rates for Price Cap	)	WC Docket No. 05-25
Local Exchange Carriers	)	
	)	
AT&T Corp. Petition for Rulemaking to Reform	)	
Regulation of Incumbent Local Exchange Carrier	)	RM-10593
Rates for Interstate Special Access Services	)	

REPLY COMMENTS OF WILTEL COMMUNICATIONS, LLC

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SUMMARY

The Commission's pricing flexibility mechanisms for special access were implemented in anticipation that the rapid increase in market entry that characterized the late 1990s would continue into the foreseeable future. The Commission (and many participants in the industry) expected that competition would develop in the special access market that would reduce the ILECs' market power and lead to lower prices, higher quality, and competitive options for purchasers of special access.

Six years later, the much-anticipated competition in the special access market has not developed. Special access remains an ILEC monopoly. Despite the ILECs' claims of widespread competition, the evidence shows that most carriers and customers have few alternatives to the ILECs for the overwhelming majority of their special access requirements. Competitive wireline facilities do not exist on most routes and to most buildings, and such facilities are unlikely to be built. Even where such facilities do exist, the competitive process has been thwarted because the ILECs have been allowed to avoid real price competition by imposing anticompetitive contractual terms and conditions that effectively prevent customers from using alternative local carriers. The imposition of pricing plans that force customers to bind their current services to the ILEC, the lack of competitive network coverage by competing providers, and the difficulties in obtaining support for Type II service have led to a situation in which ILECs are able to successfully charge a substantial premium above the price offered by CLECs.

The ILECs' continuing monopoly in the special access market is further evidenced by the continuing high prices and high margins for special access services. Unlike prices for long-haul facilities, which have decreased substantially in the face of competition, special access prices have remained the same or, at best, decreased slightly. In fact, prices in areas where pricing

flexibility has been granted have either decreased minimally or have, in many cases, increased. True competition would have forced the ILECs to reduce their prices for special access. Their ability to maintain above-market prices, despite the decrease in their costs, demonstrates their market power.

Finally, the approval of all the RBOCs' 271 applications, soon followed by the acquisition of the two largest IXCs by the two largest ILECs, magnifies the importance of reducing special access prices to cost. In 1999, if IXCs overpaid for special access, at least they all overpaid equally, so their competitive success was not predicated on undue access cost differentials. However, in a world in which the two largest ILECs own the two largest IXCs, overcharges for special access fundamentally undermine long-haul competition: whether post-merger AT&T overpays SBC for special access is irrelevant to AT&T, because the money comes out of one pocket of the corporate parent's trousers and goes back into the other pocket. For the same reason it is irrelevant if MCI overpays Verizon for special access; the corporate parent recoups the overcharge. But when independent IXCs such as WilTel overpay for special access, the overpayment is a direct subsidy from competitors to the new "SuperBOC," and there is no recoupment. Thus, the failure of the market to drive prices to incremental cost for special access is not only result of a failed effort at making the local market competitive, this failure--absent decisive action by the Commission—will subvert competition in long-distance as well. Allowing ILECs to overcharge for special access will upset the competitive balance in the long-distance market in a way that could not have been anticipated in 1999.

The Commission must take the opportunity presented by this proceeding to address the reality of the special access market as it is today, not the reality that was expected in 1999. The Commission should reject the ILECs' "evidence" of competition and their calls for additional

pricing flexibility. Instead, the Commission should revise its pricing flexibility rules as described herein and in WilTel's initial comments in this proceeding to ensure that competitive carriers and customers can obtain cost-based access to the special access facilities upon which their ability to operate depends. Prompt and forceful Commission action is especially important in light of the proposed mergers of AT&T with SBC and MCI with Verizon, which are likely to limit further the availability of competitive special access services and otherwise disrupt the special access market.

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WILTEL COMMUNICATIONS, LLC

WilTel Communications, LLC ("WilTel") files these Reply Comments to urge the Federal Communications Commission ("FCC" or "Commission") to reform the Commission's rules for pricing of interstate special access services provided by incumbent local exchange carriers ("ILECs") subject to price cap regulation.[1]

I. THE SPECIAL ACCESS MARKET REMAINS AN RBOC MONOPOLY

When the Commission established its pricing flexibility mechanism for interstate special access, it did so with the expectation that local competition would develop sufficiently to discipline the behavior of price cap ILECs, lead to lower prices and better quality for special access services, and reduce the need for regulation.[2] That optimistic view has not become reality. Rather, the ILECs have strengthened their grip on the special access market and are able to charge above-cost rates and impose anticompetitive terms and conditions with respect to their

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[1] *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Notice of Proposed Rulemaking, WC Docket No. 05-25 and RM-10593, FCC 05-18, released January 31, 2005 ("*NPRM*").

[2] *NPRM*, at ¶ 18; *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-63, 98-157, Fifth Report and Order, 14 FCC Rcd 14221, at ¶ 144 (1999).

sales of special access services. So tight is this grip that they are able to retain their market share despite charging rates that substantially exceed those offered by other providers. In short, special access remains largely an ILEC monopoly.

ILEC special access has remained impervious to competitive threat for several reasons. First, the ILECs retain a huge first-mover advantage in the special access market. Special access/transport is characterized by significant economies of traffic density and utilization up to the OC192 transport level, and there are very few individual locations or even traffic aggregating competitive access providers ("CAPs") that can fully utilize such capacity in a local market. In other words, for the vast majority of building locations, the last-mile transmission is typified by economies of traffic density across the entire range of potential demand. This is the textbook definition of "natural monopoly."

In addition, the ILEC possesses a unique relationship with the owners of multi-tenant office buildings, derived from the decades in which it was the monopoly or near-monopoly carrier. In virtually every commercial building in which there is a market for special access, ILECs own or control pre-existing facilities for provisioning of special access services. In contrast, a new entrant carrier must obtain the right to enter the building, obtain space to locate transmission and terminating equipment and install backup power, and may also need to complete special construction before service can be introduced. Then, to reach its customers' premises, a new entrant must arrange connection to the building's existing inside wiring, often by applying to its competitor, the ILEC, or it must install its own cabling, a costly effort that may require a separate license from the building owner and construction of new conduits and risers. Special access customers may understand the benefit of having competition among service providers, but that benefit is only one of many factors they consider in selecting their office

locations, so landlords have the flexibility to demand financial consideration from any second carrier wanting to serve the building, as long as the incumbent's special access service is already available to satisfy tenants' demands. Therefore, while new entrants may have to make significant payments to property owners, incumbents seldom are required to make such payments. Accordingly, even where the ILEC charges prices that substantially exceed its costs, competitive entry remains difficult.

Second, it is simply not practical or economical to maintain dozens or hundreds or thousands of different business relationships with CAPs, each with a small list of on-net sites, in order to obtain access to tens of thousands of potential customer locations. In order to turn up a new vendor WilTel must: establish an interconnection facility with that vendor (which will be inefficient unless a substantial amount of business is transacted); obtain and maintain that vendor's "on-net" location and pricing in its systems; maintain an ongoing relationship with that vendor for provisioning, monitoring and maintenance of special access facilities; adapt to that vendor's unique ordering, provisioning and billing processes; and negotiate contractual terms that allow WilTel to maintain its SLAs and service quality with respect to its own end user customers. Thus, any efficient alternatives to ILEC special access would come from larger providers that cover broad geographic areas. Unfortunately, however, the special access market displays virtually no examples of firms possessing such scope beyond the RBOCs, and the two CAPs that have come closest to achieving this breadth of service—MCI and AT&T—are about to be subsumed by RBOC mergers. WilTel's data reveal that, taken together, MCI and AT&T uniquely serve approximately 10,500 unique building locations or nearly half of all building addresses served by competitive access providers. Thus, their potential exit from the CAP market would substantially diminish the already-scant rivalry that does exist. To place the importance

of the service provided by the remaining CAPs in perspective, it is worth considering that in a declaration in support of AT&T's merger with SBC, Professors Carlton & Sider state that "AT&T's local access facilities serve a very modest number of buildings in SBC's region. . . . AT&T serves . . . roughly 0.4 percent of the commercial buildings with more than 10 voice line-equivalents in SBC's region."[3] This suggests that the CAPs remaining after AT&T and MCI are swallowed up by RBOCs serve only approximately 1 percent of commercial buildings with more than 10 voice line-equivalents.

Third, the reduced availability of UNEs that is resulting from the Commission's *Triennial Review Remand Order* ("TRRO") mean that CAPs and CLECs themselves will become more dependent on the availability of ILEC special access in order to meet their customers' needs.[4] Facilities that are in many instances a critical input to the alternative services offered by CAPs and CLECs are now held by their direct competitors—competitors that as the result of the *TRRO* enjoy near complete flexibility in pricing and contract terms for large customers.[5]

Finally, the pricing flexibility that ILECs currently enjoy in connection with their dominant incumbent position allows them to effectively tie purchase of special access in those

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[3] Reply Declaration of Dennis W, Carlton and Hal S. Sider, *In the Matter of SBC Communications Inc. and AT&T Corp. Application for Consent to Transfer of Control*, WC Docket No. 05-65, filed May 10, 2005, at ¶ 31.

[4] The Reply Declaration of Lee Selwyn appended hereto as WilTel Reply Exhibit 7 points out the irony of the RBOCs' change of tune from the TRO Remand proceeding to this docket. In that docket, the RBOCs argued that the reduced availability of UNEs was irrelevant because competitors could rely on special access; here, the RBOCs claim that special access is unnecessary because competitors can use UNEs. Reply Comments of WilTel Communications, LLC, WC Docket No. 05-25, Reply Declaration of Lee L. Selwyn (July 29, 2005) ("*Selwyn WilTel Reply Dec.*"), at ¶¶ 3-4.

[5] The *TRRO* results in facilities that previously were required to be unbundled at TELRIC rates being removed from that requirement on a wire center-by-wire center basis without regard to whether such facilities are available from alternative sources on a building-by-building or route-by-route basis. *TRRO*, at ¶¶ 5, 126, 129, 133, 146, 174. The mere fact that a given wire center has a large number of business lines and several fiber-based collocators does not mean that a given building can be economically served by a competitive carrier without the use of the ILEC's unbundled loops. This is particularly true for buildings where the demand is at the DS-1 level or at the level of a single DS-3.

relatively few locations where alternatives do exist to an embedded base of service that is already locked into long-term arrangements. Given the substantial scale barriers that an entrant must overcome, the lockup of existing demand by incumbent carriers through volume and growth-based discount plans has effectively strangled the threat of commercially viable market entry. ILECs, especially the RBOCs, enjoy increasing demand for special access despite the fact that their rates generally exceed those of access alternatives by 30-100%.[6]

The FCC must acknowledge the reality of ongoing ILEC monopoly and take this opportunity to revise its pricing flexibility rules accordingly. This is especially important in light of the proposed mergers of AT&T with SBC and MCI with Verizon, which threaten to limit further the availability of competitive special access services and otherwise disrupt the special access market.

A. There Are Few Alternatives to BOC Special Access Services

The ILECs assert that the special access market is competitive. USTA argues that "[t]here are many competitors in special access markets today" and that it is "routine" for special access customers "to receive multiple offers to meet service requests."[7] Verizon maintains that "special access competition is robust and the marketplace is working" and goes so far as to claim that "competition exists virtually everywhere that there is significant demand for special access," and that this competition comes from "a multitude of sources, including fiber-based CLECs . . . and inter-modal alternatives such as fixed wireless and cable."[8] SBC asserts that "competitors

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6 WilTel Reply Exhibit 1.

7 USTA Comments, WC Docket No. 05-25, at 8 (June 13, 2005).

8 Verizon Comments, WC Docket No. 05-25, at 38 (June 13, 2005).

have built a myriad of alternative fiber facilities over which competitors are actively serving high-capacity special access customers" and that there is "accelerating" intermodal competition.[9]

1. Carriers and Large Users Are Dependent on ILEC Special Access Services For Nearly All Their Special Access Needs

The ILECs advance these self-serving claims regarding the status of competition to urge further deregulation of their special access offerings.[10] However, their rosy descriptions conflict with the experience of WilTel and other buyers of special access. As discussed in greater detail below, the fact that purchasers do not choose alternative providers evidences the ILECs' continuing market power.

WilTel is a major competitive provider of long-haul voice, video, and data transport services to other carriers, broadcasters, ISPs, CATV companies, and small to mid-size enterprise customers, and the company operates throughout the country. To provide the end-to-end solutions that its customers demand, WilTel depends on ILEC special access services to reach customer premises. Competitive providers simply do not provide a realistic alternative to the ILECs. The most important reason is a question of numbers: WilTel data reveal that CLECs have deployed special access facilities to approximately 25,000 commercial buildings nationwide[11] – less than one percent of all commercial buildings.[12] Moreover, these facilities tend to be concentrated in a small number of markets. Even in the best-case scenario, a national carrier like WilTel could rely on competitors to ILECs for only a small portion of its special

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[9] SBC Comments, WC Docket No. 05-25, at 11; Casto Decl. at ¶¶ 11, 16.

[10] *See, e.g.,* SBC Comments, WC Docket No. 05-25, at 1-13 ("continued regulation . . . is not only unnecessary but also counterproductive").

[11] WilTel Reply Exhibit 2. Even in locations reported by CAPs, WilTel has encountered capacity and service constraints when attempting to use non-ILEC providers. Thus, 25,000 may overstate the actual number of locations of available alternative special access service

[12] *See Selwyn WilTel Reply Dec., at ¶ 14* (citing the RBOCs' *UNE Fact Report*).

access needs. Moreover, the contractual conditions and other obstacles imposed by the ILECs make it difficult for WilTel to use competitive facilities even where they are available. For example, merely to reach the less than 1% of commercial buildings where non-ILEC special access is available, WilTel has computed that 640 separate CAP interconnections would be required.

Dr. Lee Selwyn's Reply Declaration supports WilTel's experience. As Dr. Selwyn notes, the BellSouth's "evidence" regarding competition relies on unsourced data that cannot be verified or replicated and which they use to produce meaningless "measures" of special access market share.[13] Even if BellSouth's data are accepted as correct, they show BellSouth controlling 97.7% of special access tail circuits in its region.[14] Data provided by Verizon suffers from similar shortcomings.[15]

The *UNE Fact Report* relied upon by the RBOCs also misrepresents the actual state of competition in the special access market by improperly aggregating all special access services, circuit types (i.e., transport versus channel terminations), and circuit sizes. For example, the *UNE Fact Report* focuses on the relative wealth of competitive options at the OCn level. While interesting, this focus ignores the fact that by far the largest demand for special access is at the DS-1 and DS-3 level and that, as the Commission has stated, competitors have not meaningfully deployed smaller facilities.[16] By lumping all special access circuits together, the UNE Fact Report thus presents a distorted and misleading view of competition for the smaller special access circuits that are most in demand by carriers and users. Similarly, the UNE Fact Report

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[13] *Selwyn WilTel Reply Dec.*, at ¶¶ 7-9.

[14] *Id.*, at ¶ 9.

[15] *See id.*, at ¶ 11.

[16] *Id.*, at ¶¶ 12-16.

combines transport and loop facilities into a single special access category despite the drastically lower availability of competitive channel terminations.[17]

Other carriers have reported experiences similar to those of WilTel. In 2002 Sprint stated that it "continue[d] to rely upon the ILECs for approximately 93% of its total special access needs."[18] By 2004, Sprint reported that it "relied upon RBOCs for almost 95% of its DS1 circuits."[19] Even in buildings with competitive alternatives, Sprint has found that competitors can provide a connection to just a single customer in 40% of those buildings.[20] Moreover, where a competitor does offer service, it frequently must obtain the "last mile" on a resold basis from the ILEC.[21] As Broadwing observes, "[w]ith relatively few exceptions . . . the ILECs own the *only* last mile link to the target buildings and, therefore, anyone who wants to serve customers in

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[17] *Id.*, at ¶¶ 23-24.

[18] *Performance Measures and Standards for Interstate Special Access*, CC Docket No. 01-321, Comments of Sprint Corporation, at 4 (Jan. 22, 2002).

[19] *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of Sprint Corporation, at 7 (June 13, 2004) ("Sprint Comments"). *See also Selwyn WilTel Reply Dec.*, at ¶ 19 (regarding experience of XO and Xspedius).

[20] *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access*, RM Docket No. 10593, Comments of Sprint Corporation, at 4 (Dec. 2, 2002). *See also, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM Docket No. 10593, Comments of the Ad Hoc Telecommunications Users Committee, Attachment A: Lee L. Selwyn, Susan M. Gately, and Helen E. Golding, *Competition in Access Markets: Reality or Illusion, A Proposal for Regulation Uncertain Markets*, prepared for the Ad Hoc Telecommunications User Committee, at 18, n.32 (August 2004) ("*Ad Hoc Users Cmte. Rpt*" or "*ETI White Paper*") (noting AT&T's observation that competitors "are not always able to secure the building owner's permission to locate equipment in the building's common space, so that in many cases access is limited to a 'fiber to the floor' arrangement" such that only particular floors and customers can be served by CLEC facilities."). Sprint Comments, at 6 (commenting that competitors often can serve "only certain floors or individual suites in certain multi-story office buildings.").

[21] Sprint Comments, at 6; Comments of Broadwing Communications, LLC, and Savis Communications Corporation, WC Docket No. 05-25, at 11 (June 13, 2004) ("Broadwing Comments") ("the ILECs still maintain a near monopoly over the tails that connect an ILEC serving wire center to a customer premises").

those buildings must either purchase access from the ILEC or from another carrier reselling the ILEC's services."[22]

Even the largest carrier purchasers of special access – AT&T and MCI – rely on the ILECs. In 2002, AT&T self-supplied just 6,000 of the approximately 186,000 buildings it served.[23] AT&T states that it has relied on ILEC special access over 95% of the time; it self-supplied 3% of its customers and used a competitive alternative for only 2% of its needs.[24] MCI estimates that 90% of its off-net special access circuits are provisioned by ILECs.[25]

End users are subject to the same dependence on the ILECs. The Ad Hoc Telecommunications Users Committee ("Ad Hoc Users Committee"), a group of large corporate and government purchasers of special access, has stated that ILECs "remain the sole source of connectivity at roughly 98% of all business premises."[26] Thus, even the largest corporate users, who arguably have greater bargaining power than carriers, require higher capacity circuits that tend to be somewhat more widely available, and have better access to competitive offerings than smaller users, have little choice but to use the ILECs' special access service.[27]

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[22] Broadwing Comments, at 14. WilTel's experience is consistent with Sprint, Broadwing, and Savvis. Dr. Selwyn's Reply Declaration debunks, in great detail, the RBOCs' claims that competitors frequently provide their own channel termination facilities. Selwyn WilTel Reply Dec., at ¶ 26 (citing examples of AboveNet, LightCore, NEESCom/Gridcom, NEON, and OnFiber).

[23] *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM Docket No. 10593, Decl. of Kenneth Thomas, at ¶ 3 (Oct. 15, 2002) ("AT&T Thomas Dec."), at p. 1.

[24] *Id.*

[25] *Performance Measures and Standards for Interstate Special Access*, CC Docket No. 01-321, Comments of WorldCom, Corporation, at 9-10 (Jan. 22, 2002); Broadwing Comments, at 15.

[26] *Ad Hoc Users Cmte. Rpt*, at iv, 12, 16 (August 2004). The report submits that even this figure is probably too low. *Id.*, at 17.

[27] *Ad Hoc Users Cmte. Rpt.*, at 1 (The *Ad Hoc Users Committee* "has on numerous occasions advised the Commission that [the RBOCs'] view of the status of competition – while optimistic and appealing in theory – does not track with reality in the local telecom marketplace, even for purchasers with greater than average buying power.").

In contrast to the ILECs' rhetoric, WilTel and other buyers find it largely impossible to find viable alternatives to ILEC special access services. Few intramodal or intermodal alternatives exist, and most customers rely on BOC special access for all or nearly all of their special access needs.[28] As a result, purchasers are held hostage to the ILECs' inflated prices and onerous contractual terms. If the special access market were, in fact, competitive, the ILECs would not be able to impose such unreasonable terms and prices because customers would choose alternative providers.

Contrary to the BOCs' claim of ubiquitous competition, there is instead nearly ubiquitous dependence upon ILEC-supplied special access. The reality is that competitive wireline alternatives are, at best, confined to a small number of concentrated business districts, a small number of buildings within those districts, and often to individual floors or suites within those buildings. Even where a competitive circuit is available, the last mile is commonly a resold ILEC circuit. This is not competition—this is general monopoly, subject to limited oligopolistic rivalry in a very limited number of locations. As WilTel demonstrates below, the *de minimus* level of rivalry is clearly insufficient to stem the market failure stemming from monopoly pricing and restricted output.

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[28] *See, e.g., Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Notice of Proposed Rulemaking, WC Docket No. 05-25 and RM-10593, Declaration of Susan M. Gately, on behalf of Ad Hoc Telecommunications Users Committee, at ¶¶ 16-19 (June 13, 2005) ("*Gately Declaration*") ("RBOCs remain the sole source of dedicated access connectivity at roughly 98% of all business premises nationwide, even for the largest corporate users.");AT&T Thomas Dec. at ¶ 3; *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Notice of Proposed Rulemaking, WC Docket No. 05-25 and RM-10593, at 6 ("Comments of PAETEC Communications, Inc.") (Even in "high-density markets" . . . "PAETEC is dependent on ILECs for 95 percent of its special access lines").

2. Intermodal Competition Does Not Exist

RBOC claims of intermodal competition for special access services are at best farfetched. The Commission has been justifiably dismissive of the existence of intermodal competition for enterprise customers. The Commission has stated that cable modem service is primarily a residential service and that there is "little evidence that cable companies are providing service at DS1 or higher capacities."[29] This observation is consistent with the experiences of carriers and users. The *Ad Hoc Users Committee* has noted that "intermodal providers are not capable of supplying a sufficient quantity or quality of service to represent a serious competitive choice" for large businesses.[30] Cable infrastructure is not available to the "vast majority of office buildings and other business sites."[31] Moreover, the telephony and data products offered by cable systems do not provide the reliability, security, upstream data rates, and other capabilities demanded by business users.[32] In addition, cable's shared platform architecture results in lower transmission speeds and security concerns.[33] Indeed, WilTel has on several occasions approached cable companies with the goal of using them as substitutes for LEC special access. In virtually all cases, the cable firms had failed to develop products for the wholesale market that could be used

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[29] *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 19 FCC Rcd 16783, FCC 04-179, at ¶ 193 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*") ("cable providers are focusing their marketing strategies on residential users and 'small and medium businesses … that are near the residential network.'"). *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146, Third Report, FCC No. 02-33, 17 FCC Rcd. 2844, *at* ¶ 45 (2002); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Reply Comments of the Ad Hoc Telecommunications Users Committee, at 4-6 (April 22, 2002).

[30] *Ad Hoc Users Cmte. Rpt.*, at 22.

[31] *Id*.

[32] *Triennial Review Remand Order*, at ¶ 193; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Comments of the Ad Hoc Telecommunications Users Committee, at 18 (March 1, 2002).

[33] *Id.*; *Ad Hoc Users Cmte. Rpt.*, at 27.

as substitutes for LEC special access. Moreover, given their numerous priorities related to retail service, WilTel finds little reason to expect that their attitude or interest will drive them toward the special access market in the foreseeable future.

Likewise, fixed wireless is not a substitute for wireline special access. Fixed wireless services are beset by operational problems, including "security and possible performance degradation from interference with other service providers."[34] The Commission's comment that "fixed wireless entry in the enterprise market … has been limited"[35] is an understatement; today, there are just 25,000 fixed wireless enterprise lines in operation.[36] Even if all of them were special access lines, they would represent less than 0.02% of the special access market. Moreover, as Dr. Selwyn points out, even the *UNE Fact Report* relied upon by the RBOCs in support of their claims regarding fixed wireless makes clear that few, if any, competitive carriers are using fixed wireless in a meaningful way.[37]

In the late 1990's, WilTel itself attempted to extend its network using fixed wireless services from broadband suppliers. WilTel's experience is illustrative of the problems endemic to the use and acceptance of this technology as a substitute for special access. First, obtaining building access from the rooftop for a fixed wireless provider is no less daunting a task than it is for a CLEC attempting to enter the building from the street—in some cases it is more daunting, and more expensive as the service provider must obtain spectrum, rooftop rights, and

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[34] *Id.*, at 23-24.

[35] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand, 18 FCC Rcd 16978, at ¶ 45, n.144 (2003) ("*Triennial Review Order*").

[36] *Id.*

[37] Selwyn WilTel Reply Dec., at ¶¶ 21-22.

connectivity between the rooftop and the data room of the building (often located in the basement where landline access enters the building). As a result, the cost of creating such transmission systems often exceeds landline alternatives. More importantly, reliability, survivability and security of wireless transmission schemes are viewed by customers as second-rate compared to landline alternatives. Thus, even where the wireless service provider discounts its rate below the ILEC price, wireless access is not a substitute for landline special access. As a result of these issues WilTel abandoned its efforts at marketing wireless local access.

WilTel is not the only firm to fail in successfully marketing fixed wireless as a substitute for special access. Advanced Radio Telecom (ART), Teligent, and Winstar, the leading entrants in this space, have all gone through bankruptcy. In the mid-1990s Ameritech attempted to market ART's fixed wireless product, but ultimately abandoned the effort. AT&T at one time promoted the "pizza box" wireless data antenna as an alternative access method. All of these attempts have failed to gain market acceptance and have largely disappeared from the marketplace.[38]

3. The Proposed Mergers of SBC and Verizon with AT&T and MCI Will Further Limit Competition For Special Access Services

The proposed mergers of AT&T with SBC and MCI with Verizon threaten to reduce further the availability of competitive special access services. AT&T and MCI own the country's largest concentrations of competitive access assets both in terms of their density in specific geographic regions as well as their nationwide scope. Between them, they uniquely

[38] Telephony, COMMUNICATIONS DAILY, April 26, 2001, available at LEXIS, News & Business Library, Telecommunications File (reporting the numerous bankruptcies and near-failures of companies in the Local Multipoint Distribution System ("LMDS") business market, along with the limited growth of Multichannel Multipoint Distribution Service ("MMDS"), in which several large companies invested). See, also J.G. Edwards, LAS VEGAS REVIEW-JOURNAL, AT&T Forces Las Vegas-Area Customers to Find New Phone Company, November 22, 2001, available at LEXIS, News & Business Library, Telecommunications File (reporting that 2800 customers were given 60 days to find new local service as AT&T discontinued fixed wireless service and removed its pizza box-sized equipment from homes.)

provide service to almost one-third of buildings where a potential access alternative exists, and offer service in nearly half of the total buildings where a CAP is present.[39]

MCI is, by far, WilTel's largest competitive supplier of special access. AT&T and MCI also are the largest purchasers of special access.[40] The mergers therefore portend several deleterious effects on the special access market. Most important, carriers and users will almost certainly lose access to the most (and often only) commercially significant competitive providers of special access, at least in the home territories of SBC and Verizon.[41] In addition, the mergers will eliminate the largest non-BOC purchasers of special access, dramatically reducing independent demand for these services. The already significant barriers to entry for the special access market – including obtaining building entry rights, installation and maintenance costs, and regulatory compliance – and the difficulty of recouping the costs of entering and competing in the special access market, make entry difficult even in the densest, most attractive markets.[42] The elimination of AT&T and MCI as independent purchasers of competitive facilities will further reduce the incentive for competitors to build those facilities. In a vicious cycle, this lack of new investment by competitors will make purchasers ever more dependent on the ILECs.

The mergers also threaten to undermine the wholesale market that exists now for special access. AT&T and MCI are among the few carriers not affiliated with an ILEC that qualify for the ILECs' highest volume discounts. As a result, AT&T and MCI qualify for large discounts from the ILECs' inflated special access rates, and resell some of these services to competitive

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[39] WilTel Reply Exhibit 2.

[40] *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Declaration of Alfred E. Kahn and William E. Talyor on behalf of BellSouth, Qwest, SBC and Verizon, at 23-24 and Table 14, (Dec. 2, 2002).

[41] BT Americas, Inc. Comments, WC Docket No. 05-25, at 8-9; Broadwing Comments, at 20.

[42] BT Americas Comments, at 10.

carriers.[43] There is little reason to think that after acquiring AT&T and MCI, SBC and Verizon will continue this practice;, the result will be an increase to the cost of special access. Experience with previous mergers has demonstrated that the BOCs do not compete in each others' regions, even where required to do so by the Commission.[44] There is no reason to think that they will do so in the special access market.

The mergers will also eliminate whatever downward price pressure AT&T and MCI exert on ILEC special access prices. No other carriers purchase a comparable volume of special access, and only AT&T and MCI could realistically threaten to build their own special access facilities on a scale to compete with the ILECs. The Commission has recognized that high costs, economies of scale, difficulties securing rights of way, and other operational impediments make it unlikely that competitive carriers can replace AT&T and MCI's services.[45] The mergers will thus remove any remaining competitive constraints on the ILECs' actions.

Finally, the approval of all the RBOCs' 271 applications, soon followed by the acquisition of the two largest IXCs by the two largest ILECs, magnifies the importance of reducing special access prices to cost. In 1999, if IXCs overpaid for special access, at least they all overpaid equally, so their competitive success was not predicated on undue access cost

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[43] BT Americas Comments, at 9-10; Broadwing Comments, at 19-20.

[44] The Bell Atlantic-GTE merger, for example, shows that that the BOCs will not compete out-of-region in a meaningful way even when required to do so by merger conditions. *In re Application of GTE Corp. Transferor and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations*, CC Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, at ¶ 319 (June 16, 2000) ("the combined firm will spend at least $500 million to provide competitive local service and associated services outside of the Bell Atlantic and GTE legacy service areas."); *See Application of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999). In neither instance did the BOCs live up to their commitments or their regulatory obligations.

[45] *Triennial Review Remand Order*, at ¶¶ 150-151; Broadwing Comments, at 21.

differentials. However, in a world in which the two largest ILECs own the two largest IXCs, overcharges for special access fundamentally undermine long-haul competition: whether post-merger AT&T overpays SBC for special access is irrelevant to AT&T, because the money comes out of one pocket of the corporate parent's trousers and goes back into the other pocket. For the same reason it is irrelevant if MCI overpays Verizon for special access; the corporate parent recoups the overcharge. But when independent IXCs such as WilTel overpay for special access, the overpayment is a direct subsidy from competitors to the new "SuperBOC," and there is no recoupment. Thus, the failure of the market to drive prices to incremental cost for special access is not only result of a failed effort at making the local market competitive, this failure--absent decisive action by the Commission—will subvert competition in long-distance as well. Allowing ILECs to overcharge for special access will upset the competitive balance in the long-distance market in a way that could not have been anticipated in 1999.

II. SPECIAL ACCESS PRICING REVEALS THAT ILECS MAINTAIN SUBSTANTIAL MARKET POWER

A. WilTel's Examination Reveals that Standard Prices Have Not Fallen Significantly—Despite Lower Prices from CAPs

Conflicting claims have been made regarding whether prices for special access services have increased or decreased during the CALLs regime. Not surprisingly, competitive carriers assert that prices have remained flat or increased, while the ILECs claim that prices have decreased.[46] This dissonance prompted WilTel to perform a thorough examination of pricing data related to its own purchase of special access. WilTel notes that there are numerous pricing

[46] *See, e.g.*, Joint CLEC Comments, WC Docket No. 05-25, at 10-13. BellSouth acknowledges that its month-to-month prices for DS1 and DS3 special access services have increased and that tariffed rates have gone up 8 to 9 percent. BellSouth Comments, at 14-16. SBC likewise admits that its Phase II basic tariff rates are higher than those in price cap MSAs. SBC Comments, Casto Declaration, at n.49.

plans under which special access can be procured from an ILEC. In WilTel Reply Exhibit 3, WilTel categorizes the numerous special tariffs and contract discount plans under which special access can be purchased, in addition to standard 1, 3, and 5 year tariff pricing. The proliferation of pricing plans does suggest that there are lower prices available than "standard rates." In reviewing the access alternatives offered by CAPs, however, WilTel determined that the terms and conditions under which CAPs offer special access are very similar to those offered under RBOC standard tariff pricing. Therefore, if CAP services were close substitutes and CAP pricing consistently below RBOC pricing, one would expect that absent other market features, there would be heavy demand for CAP services and sharp reductions in demand for RBOC services.

WilTel's examination, as depicted in WilTel Reply Exhibits 4-5, shows that prices for DS-1 and DS-3 special access circuits have remained the same or decreased slightly for interoffice and channel terminations and have increased slightly for stand-alone channel terminations in pricing flexibility areas. More significantly, where pricing flexibility has been granted, special access rates remain far above UNEs, which are based on forward-looking costs.[47] Finally, as depicted in WilTel Reply Exhibit 1, the standard rates for RBOC special access far exceed rates offered to WilTel by CAPs. If there were truly a competitive market for special access, this would not occur. Rather, ILECs would have been forced to reduce their prices toward forward-looking cost to compete, and their standard pricing would match that offered by CAPs. The fact that ILEC prices have not fallen more and remain well above the

[47] The ultimate goal of a market-based approach to regulation is to allow competition to "drive interstate access charges toward the costs of providing these services." Access Reform First Report and Order, 12 FCC Rcd at 16094.

price for alternative services demonstrates that competition under current circumstances is insufficient to generate efficiency-maximizing prices.

Indeed, while the rest of the telecommunications industry has reduced prices in line with greater productivity, the ILECs' sales of special access seem to be largely immune from such forces. To meet competition in the long-haul transport market, since 1999 WilTel has been forced to reduce DS3 prices by over 80%, based on typical WilTel DS3 transport rates in 1999 vs. 2005.[48] Wholesale long distance prices have declined by well over 50% in the industry in general.[49] WilTel has also observed substantial reductions in the rates offered by CAPs.

Many of these price reductions are, no doubt, the result of dramatic reductions in the cost of providing service. Transmission equipment, typically the largest incremental cost of increasing special access capacity, has substantial price decreases since 1999. Based on data provided to WilTel by its vendors, a new OC48 transmission system typically used by a local exchange provider in 1999 that would have cost about $80,000 can now be obtained new for only $35,000, a reduction of more than 50%. In addition, demand has increased significantly, providing for greater transmission density on specific routes and, presumably enabling the use of more cost-effective higher-speed transmission technologies.

Surprisingly, however, despite huge price declines in truly competitive sectors of the telecommunications market and substantial cost declines for transmission equipment, where ILECs have been granted pricing flexibility, prices have not declined substantially. Indeed, in some instances, ILEC prices have increased.[50] WilTel's analysis shows that special access base

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[48] Based on WilTel pricing for a 500-mile long distance DS-3.

[49] Based on a comparison of WilTel wholesale long-distance prices in 1999 and 2005.

[50] WilTel Reply Exhibits 4, 5.

rates for interoffice mileage plus channel termination services have either remained steady or slightly decreased.[51] Absent participation in a revenue commitment plan, therefore, IXCs pay roughly the same amount for a POP-to-End User special access service that they did in 2001, notwithstanding ILEC claims of a vibrantly competitive market, and despite the fact that ILEC competitors do not require substantial revenue commitments. In addition, if the IXC sought a standalone channel termination special access service, it would likely be paying more than it did in 2001.[52] WilTel Reply Exhibit 6 shows that pricing of channel terminations in pricing flexibility areas substantially exceeds price cap pricing for virtually all ILECs and contract terms investigated. This is an amazing result, since pricing flexibility was granted in geographic zones where the density of traffic presumably made the threat of entry and viability of competition the greatest. It would appear that price caps, despite LEC claims regarding their inadequacies, did a far better job of disciplining prices than competition.[53]

WilTel's analysis of RBOC discount plan pricing shows that RBOCs are able to sell successfully despite maintaining rates for most services that substantially exceed those offered by CAPs. Even when compared to RBOC discount plans, CAP pricing to on-net buildings is substantially more favorable than RBOC pricing. WilTel Reply Exhibit 1 shows that, where CAPs have on-net capability and are offering services, their 12-month prices are substantially lower that RBOC 12-month prices. This data further shows that, in many cases, CAP 12-month

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[51] WilTel Reply Exhibits 4, 5.

[52] WilTel Reply Exhibit 5.

[53] *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25 and RM-10593, Comments of BellSouth, Attachment 7, Declaration of Harold Furchtgott-Roth and Prof. Jerry Hausman, at 5, 10-11, 24-26 (June 13, 2005).

prices are lower even than the fully discounted 60-month RBOC prices.[54] Even when priced under a 60-month plan with substantial revenue commitments, RBOC service is generally not price-competitive with CAP 12-month pricing for a POP-to-End User service.[55] In a competitive market, where CAP special access acted as a close substitute for ILEC special access, customers would defect to the CAP from the ILEC in droves. That this has not happened underscores both the power of the ILEC discount payment plans in locking up demand for incumbents and the absence of CAP availability to most locations.

B. Evidence from Other Sources Supports WilTel's Empirical Review

Evidence submitted by other commenters supports WilTel's conclusions. T-Mobile compared the prices for special access DS1 channel terminations (based on a 36-month term) and the prices for DS1 UNE loops in Florida, Illinois, New York, Texas, and Washington and found that the BOCs' special access rates were 125.25, 367.97, 160.20, 145.61, and 148.90 percent higher than UNE rates.[56] A comparison of special access and UNE prices for DS1 and DS3 channel mileage revealed similar disparities.[57]

When rates offered by competitors are compared to the BOCs' special access rates the disparities are even more pronounced. T-Mobile compared special access prices to data from benchmark competitive markets to determine whether the special access prices were above or

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[54] WilTel Reply Exhibit 1.

[55] *Id.*

[56] T-Mobile Comments, WC Docket No. 05-25, Declaration of Simon J. Wilkie, ¶ 19, Appendix 2.

[57] T-Mobile concluded that prices for special access DS1 channel terminations in Florida, Illinois, New York, Texas, and Washington are 131.79, 463.35, 238.15, 387.76, and 364.71 percent higher than UNE rates. Prices for special access DS3 channel terminations in the same states were 128.30, 179.76, 210.51, 227.39, and 190.08 percent more than UNE rates. *Id.*

below the benchmark.[58] For transport, ILEC special access rates were compared to competitors' prices for inter-city transport services on routes with facilities-based competition.[59] T-Mobile concluded that "the cost of a 10 mile Verizon special access DS3 circuit in New York is $1,817.12, or over 100 times more than the $14.00 per mile price of a circuit of the same length along the New York-Los Angeles route."[60] Competitors certainly would have entered into such a lucrative market but for the existence of barriers to entry that make it uneconomic for them to enter.[61] T-Mobile further concluded that, even taking into account the economies of scale associated with distance, special access price in every market analyzed ranges from two to six times the expected price if competition existed.[62] This is consistent with the experience of WilTel and CompTel/ALTS that the prices of competitive access providers often are 30% to 50% below ILEC rates.[63]

As previously noted, BellSouth admits that its month-to-month prices for DS1 and DS3 special access services have increased and that its tariffed rates have increased.[64] BellSouth asserts that rates for DS1s held for 24 months or longer have remained constant;[65] however, even if true, the fact that rates have stayed the same in a declining cost environment is "tantamount to

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[58] *Id.*, at ¶ 10.

[59] *Id.*, at ¶ 11.

[60] *Id.*, at ¶ 13.

[61] *Id.*, at ¶ 14.

[62] *Id.*, at ¶ 18.

[63] WilTel Reply Exhibit 1; CompTel/ALTS Comments, WC Docket 05-25, Declaration of Janet S. Fisher., ¶ 9 (concluding that competitors' rates for special access are one-half to one-third of the BOC prices).

[64] BellSouth Comments, at 14-16.

[65] *Id.*, at 17

a price increase."[66] SBC even admits that its rates are higher in MSAs with pricing flexibility.[67] While Verizon maintains that its special access prices have declined, the evidence it proffers is not a comparison of actual changes in price, but is an modeling exercise based on "average revenue per voice grade equivalent."[68] Such a "modeling exercise" would be unnecessary if Verizon's prices really had dropped—prices could simply be mapped on a product-by-product basis, as done by WilTel. If mapped that way, they would, however, show that prices for typical special access products have not decreased, only that customers are purchasing transport capacity in larger increments that have lower unit prices (i.e., a single DS1 is priced higher than 1/28 of a DS3).[69]

As AT&T explained in the Triennial Review Remand proceeding, "special access services are not priced or sold in terms of 'average revenue per VGE,' but instead [are] denominated in terms of multiple pricing dimensions … including, among other things, bandwidth (capacity) and distance."[70] If Verizon's claims that its special access prices have dropped were true, it could have shown that through a comparison of actual tariff prices rather than by means of the indirect and inaccurate device of average revenue per VGE.

It is natural for unit prices to decrease when customers shift their demand to larger units. For example, as Dr. Selwyn observes, while an OC-12 facility is equivalent to 336 DS-1s, it is

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[66] Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, RM-10593, attachment, Reply Declaration of M. Joseph Stith (dated Oct. 19, 2004) ("Stith Dec."), at ¶ 17 (filed in RM-10593 Dec. 7, 2004).

[67] SBC Comments, Casto Declaration n.49. SBC asserts that this is due to the X-factor reductions to price cap rates that are mandated by the Commission's rules and which do not apply in MSAs with pricing flexibility.

[68] Verizon Comments, Declaration of Dr. William Taylor ("Taylor Dec."), at ¶ 16.

[69] Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, RM-10593, attachment, attaching, *inter alia*, Declaration of Lee Selwyn (dated Nov. 8, 2004) ("Selwyn Dec."), at 8.

[70] *Id.*, at 9.

typically priced at only about 40 times the price of a single DS-1. "Thus, when purchased as part of an OC-12, the price of a single VGE channel is only 12% of the per channel price when purchased as part of a DS-1.[71] As Dr. Selwyn further points out, because, in recent years, "the demand for very high capacity OCn services has been growing at a much faster rate than the demand for individual DS-1s or DS-3s . . . even if prices of specific services had remained unchanged, the average 'revenue per VGE channel' would fall, because successively larger percentages of voice-grade equivalent channels are being purchased as part of very high capacity OCn services."[72]

Dr. Selwyn finds further fault with the RBOCs' pricing studies in that "Verizon, BellSouth and SBC have all commingled price movements that were *required* under the Commission's price cap rules with RBOC-initiated price changes made following the onset of pricing flexibility."[73] Dr. Selwyn shows that special access revenues charged by the RBOCs were roughly 18.35% higher than they would have been if the Commission's GDI-PI 6.5% annual price cap adjustment had been in effect for all special access services and for the periods 1996 – 2003.[74] Dr. Selwyn further points that the RBOCs' studies do not consider the extent to which average prices have been reduced by "contracts that impose substantial volume and term commitments, coupled with large financial penalties, in exchange for 'discounts' off the prevailing month-to-month pricing."[75] These onerous conditions in effect constitute an

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[71] Selwyn WilTel Reply Dec. at ¶ 40.

[72] *Id.*

[73] *Id.*, at ¶ 35.

[74] *Id.*, at ¶ 36.

[75] *Id.*, at ¶ 39.

additional "price" for the purchase of special access, a price that the RBOC studies fail to consider.[76]

Consistent with WilTel's conclusions, discussed above, Sprint notes that rates are significantly higher in MSAs with pricing flexibility than in price cap areas.[77] According to Global Crossing, DS1 channel terminations are 22 to 47 percent higher in Qwest pricing flexibility areas and DS1 mileage rates are 13 to 71 percent higher in BellSouth pricing flexibility areas.[78] The Phoenix Center and the *Ad Hoc Users Committee* also conclude that the ILECs increase their special access rates where they have pricing flexibility.[79] Finally, the Declaration of Joseph Stith showed that for 10-mile and 0-mile circuits the ILECs' tariffed month-to-month and Optional Pricing Plan ("OPP") rates for DS1 and DS3 subject to pricing flexibility are generally greater than corresponding price cap rates.[80] When evaluating the differences between 2001 and 2004 month-to-month rates, Mr. Stith consistently found that 2004 rates are equal or greater to the 2001 rates.[81] The results are similar for the ILECs' OPPs[82] and zero-mile DS-1 circuit.[83]

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[76] *Id.*, at ¶¶ 42-43.

[77] Sprint Comments, at 5. Sprint estimates that its cost for special access in 2004 was $103 million higher than it would have been under a price cap regime.

[78] CompTel/ALTS Comments, at 7.

[79] Set it and Forget it? Market Power and the Consequences of Premature Deregulation in the Telecommunications Markets, at Table 1; *Ad Hoc Users Cmte. Cmts.*, at 21, Attachment C.

[80] Stith Dec., at ¶ 19, Attachment 1 at 1, and Attachment 2 at 1.

[81] Qwest's month-to-month pricing flexibility rates for a ten mile DS1 and DS3 are 25 and 56 percent higher, respectively, on average than in 2001 under price cap rates. Reply Declaration of M. Joseph Stith (dated Oct. 19, 2004) (filed in RM-10593 Dec. 7, 2004), ¶ 19 (attached to Ad Hoc Users Comments) ("Stith Rep. Dec."). Verizon-South's, SBC's, Verizon-North's, and BellSouth's are 15, 13, 10, and 8 percent higher, respectively. *Id.*

[82] Qwest raised its DS1 and DS3 OPPs by 13% and 42%, respectively, and Verizon-North increased its DS1 OPPs by 18%. Stith Rep. Dec., at ¶ 17. Although BellSouth and SBC's rates are the same as in 2001, as discussed previously this is effectively the same as a price increase given the ILECs' reduced costs. Id., at ¶ 18.

[83] *Id.*

SBC argues that such comparisons are arbitrary because the regulated rates are set under price caps determined initially under rate-of-return regulation and various X factors and because the rates in price cap areas might be below what would prevail in a "free" market. SBC misses the point. When the Commission instituted price caps, it sought to emulate the efficiency-maximizing rates that result from a competitive market by taking the base rates (set under rate of return) and applying an X factor to reduce the rates based on ILEC productivity. It is the existence of incremental cost-based rates tied to least-cost production methods, and the desire for profit impelling innovation and further cost and price decreases that yield the efficiency and social welfare maximizing results that policy-makers seek.

Given production-cost decreases and economies of scale combined with increasing demand, as evidenced by pricing changes in other sectors of the telecommunications market, social welfare maximizing prices should be substantially lower than they were in 1999, and if competition in the "free market" were to achieve welfare maximizing prices, such prices would certainly be lower than those controlled by the conservative "X-factor" changes made since 1999. Importantly, no ILEC has brought forth evidence that they are not recovering their costs in areas where price cap regulation is in place.

If SBC's contention is that "free market" prices would have been higher than price cap rates, and price cap rates already fully recover costs in areas where unit costs should be higher than in pricing flexibility zones, then SBC's version of "free market" pricing bears no resemblance to the "competitive market" pricing result that policy-makers seek to obtain. The RBOCs have presented no evidence that their costs have gone up—which in some cases their special access prices have. It is also amazing that the RBOCs claim that "free market" special access rates might in many cases be higher than those that are currently constrained by price

caps, and then—as described below—these same RBOCs offer substantial discounts on the price of those supposedly below-cost services in exchange for restrictive contractual terms that have little to do with reducing the costs of producing special access. Viewed from this perspective, SBC's argument adds up to another apology for monopoly and super-normal profits.[84]

III. THE ILECS' EXCLUSIONARY CONTRACT TARIFF PROVISIONS DEMONSTRATES THEIR CONTINUED MARKET POWER

A. The Terms of the ILECs' Discount Plans Reflect The ILECs' Market Power

RBOCs argue that rather than examining their prices in a head-to-head comparison with those offered by the CAPs using similar terms and conditions, pricing for special access should be reviewed taking into consideration the substantial discounts available under their tariffed revenue and volume commitment plans. As WilTel Reply Exhibit 1 demonstrates, however, even when comparing ILEC discounted prices to those offered by CAPs, the RBOC commands a substantial premium above the CAP rate. Likewise, it is indisputable that discounted ILEC special access rates are higher than UNE rates. The fact that the combination of special access prices, terms and conditions have not become more equal between the incumbents and entrants is already a signal that impediments to competition exist. Closer examination of the terms and conditions to which special access customers must submit themselves in order to obtain discounted prices further reveals the extraordinary leverage the ILECs' retain by virtue of their historic monopoly .

The vast majority of special access revenues in a given quarter or year stem not from "new" services turned up in that year but from the embedded base of services that have

[84] SBC Comments, WC Docket No. 05-25, at 34 (The FCC would need to set a rate of return for special access services higher than 11.25% because "competitive pressures subject the ILEC special access business to much greater risk than before").

accumulated over the course of many years. Under the FCC's current rules the ILECs have been granted the right to leverage this embedded base in order to ensure that customers continue to purchase their new services from the ILEC regardless of the price differential between the new service offer by the ILEC and a lower priced alternative offered by a CAP.

The ILECs' plans typically contain regional demand commitments, mandated bundling of competitive and non-competitive routes, high penalties and non-recurring costs for termination of service.[85] These terms and conditions would not be accepted by customers if they had realistic competitive alternatives to the ILECs for new services or could easily shift their embedded based demand to alternative suppliers. The ILEC discount plans however, erect substantial barriers to both of these possibilities. "[T]he structure of ILEC discount plans – under which carriers are offered substantial discounts on their total spend only if they meet conditions such as purchasing from the ILEC 90% or more of the amounts of special access they purchase in the past" limit the ability of WilTel to use competitive providers.[86] Dr. Selwyn has made the same point: because an ILEC is "the only source of special access services to every customer location throughout the LEC's footprint," the ILEC can use discount pricing plans based on a customer's aggregate purchases throughout the ILEC's territory.[87]

Under one SBC plan, for example, "the customer (an IXC or a CLEC) is required to commit 90% of its total special access demand to SBC, or purchase 90% of its base period demand from SBC," to qualify for the discount or avoid incurring a penalty.[88] In order to meet the volume requirement, special access customers often must forego purchasing special access

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85 WilTel Reply Exhibit 8 summarizes some examples of RBOC volume commitment plans.

86 Initial Comments of WilTel, at 5, 13-14.

87 *Id.*, at 13.

88 *Id.*

services from a competitor even if the customer could obtain better terms. Another SBC discount plan requires special access customers to buy special access in each of SBC's five regions, regardless of the customer's needs, to qualify for the discount. Again, this prevents a customer from using a competitor's special access services in a particular market even if the competitor's terms are superior to those of SBC. Nearly all RBOCs have comparable plans. Examples of these plans are summarized in WilTel Reply Exhibit 8.

To deter customers further from using competitors, ILECs impose hefty penalties if a customer fails to meet its demand commitment. These penalties result in "bundling"[89] or "tying" contracts that force customers to purchase ILEC special access even on competitive routes in order to obtain the discounts they need to compete on the majority of routes that are non-competitive.[90] The plans also have "take or pay" provisions that impose liability if a customer fails to meet its demand commitment. Customers buy unneeded circuits because it is cheaper than paying the penalties.

The ILECs also commonly impose non-cost based charges and follow grooming policies that inhibit special access customer from moving to competitors. SBC imposes a one-time charge in PacBell territory of $5,000 to move a circuit to another carrier.[91] Broadwing notes that the ILECs impose termination penalties on a circuit-specific basis such that if a customer moves a circuit to a competitive provider, it must pay a termination penalty for that circuit even if its

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[89] The *NPRM* refers to bundling as "the practice ... of conditioning the pricing of the monopoly portion of a customer's demand on the choices the customer makes for the competitive portion of demand." *NPRM*, at ¶¶ 119-125.

[90] Initial Comments of WilTel, at 9, 19.

[91] *Id*., at 15; *See* Pacific Bell Telephone Company, Tariff F.C.C. No. I, § 6.8.2(H), page 6-216, and § 7.5.9 (D), pages 7-189 and 7-190.

overall spending with the ILEC does not change.[92] Sprint comments that it is "administratively and financially difficult (in some cases, impossible) to efficiently migrate existing special access facilities" to a competitive provider.[93] The ILECs also limit the number of circuits that they will migrate. SBC will migrate only eight special access circuits per night per customer.[94] Others impose high and non-cost justified charges for coordinated migrations.[95]

In contrast, competitive providers of special access offer shorter contractual terms (as little as 1 year) and typically do not charge a termination penalty for a specific circuit if the customer's overall spending remains above a certain level.[96] Thus, the ILECs cannot reasonably claim that their terms and conditions are consistent with market practice, except when compared with other ILECs.

The RBOCs also use their incumbency to force customers to recommit service at the end of existing service terms. RBOCs have justified substantial pricing discounts for term commitments on special access by arguing that extended terms allow the RBOC and extended period to recover the capital that was expended in initially constructing and installing the customer's special access infrastructure. Under RBOC pricing plans, however, if a customer signs up for a 60 month term, in the 61st month that customer must sign up for a new 60 month term or face much higher monthly prices. From a cost perspective there is nothing to

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92 Broadwing Comments, at 26.

93 Sprint Comments, at 6.

94 Sprint's experience is similar: "[S]ome RBOCs limit the quantities of circuits that can be migrated per night or by type of service, or assess high non-recurring charges for coordinated service termination." Sprint Comments, at 6-7.

95 Verizon imposes a nonrecurring charge per channel termination of $380 for so-called "Coordinated Retermination." Sprint Comments, at 7 (citing to Tariff FCC No. 1, Section 7.5.9(a)(1)). In contrast, the installation charge for other services is only $1.00 per channel. Sprint Comments, at 7.

96 Broadwing Comments, at 26-27.

differentiate the 60th month of an existing service from the 61st month. In fact, in the 61st month, deployment and installation costs have been recouped and the circuit price represents nearly pure profit for the incumbent. Yet, from the customer perspective, the RBOC's market dominance puts it in the position of forcing the customer to recommit to another 60 months (at prices designed to re-recoup the RBOCs investment cost) or face the penalty of higher month-to-month pricing.

This pricing mechanism creates a very small window of opportunity for the carrier purchasing special access to work with its end user customer to move service to an alternate special access provider. It precludes purchasers from using their leverage to obtain better pricing on their embedded base by using the threat of moving all traffic to an alternate carrier. Finally, forcing customers to "re-up" to lengthy terms increases the already substantial differential between special access pricing and special access cost. The incumbent RBOC prices the recommitted special access service as if it were based on new capital investment and installation, when in fact, its costs are almost entirely sunk investment that the customer paid for during the initial circuit term—a very lucrative business—for the seller. As a result, RBOCs have moved over the past 5 years to substantially increase the pricing differential between short and long-term circuit terms.

Through their imposition of these conditions, the ILECs use their first-mover advantage and the ubiquity of their networks to structure discount plans that have the effect of locking in substantially all of a customer's special access demand and making it economically infeasible for carriers to use competitors for even a portion of their needs. CompTel/ALTS comments that plans such as SBC's Managed Value Plan ("MVP") have allowed ILECs to "entrench their market power … effectively lock[ing]-up demand and undermin[ing] the ability of carriers to

reach sufficient scale to become effective competitors."[97] The ILECs are able to inhibit the development of competition through their discount structure without losing money, because the baseline prices that they are "discounting" are well above cost.

In addition, RBOC discounts have focused on high capacity services where the intensity of traffic demand would be supportive of CAP entry. Meanwhile, the discount plans on which the ILECs base their defense of access charges provide little relief for customers seeking competitive rates, terms and conditions. WilTel Reply Exhibit 3 shows that the vast majority are geared toward lower prices for higher level services such as OCn and SONET rings. A large number address only interoffice services. Only a few contract tariffs are available for channel terminations (or channel termination/interoffice mileage combinations), and even those are almost all subject to the anti-competitive revenue obligations discussed below. The plans do not provide a reasonable substitution for the special access services required by IXCs, and they provide real discounts only for long term commitments based on customer revenues for different services in different service areas. What these discount plans show, therefore, is that the market is not competitive enough to constrain ILEC prices.

These ILEC tactics are unreasonable and discriminatory, and thus illegal under the Telecommunications Act. However, for purposes of this proceeding, they are most relevant because they evidence the lack of effective competition in the special access market. If real

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[97] CompTel/ALTS Comments, at 11, 14-20. SBC's MVP plan "provides discounts on top of those available under SBC's base tariff discount plan" in exchange for a carrier's commitment to maintain 100% of historical spending over a five-year period on a bundle of services including special access. CompTel/ALTS Comments, at 14. S*ee, e.g.*, Southwestern Bell Telephone Co., Tariff FCC No. 73, § 38 at 3rd Revised Page 38-1 through Original Page 38-25 ("MVP Tariff"). The MVP plan imposes a Minimum Annual Revenue Commitment ("MARC") for a carrier's total recurring charge bill for nearly all forms of transport (entrance facilities, high capacity DS1, DS3, and OCn services, and certain other services) that must be met to avoid substantial penalties. CompTel/ALTS Comments, at 15; MVP Tariff, at § 38.3. If the customer fails to meet the MARC then it must "choose between paying the difference between its minimum annual commitment and the actual amount spent (becoming effectively a take-or-pay contract) or terminate the agreement and pay termination liabilities. CompTel/ALTS Comments, at 16.

competition existed, the ILECs could not impose such onerous terms and conditions because customers would move their service to competitors. The fact is that the overwhelming majority of market and routes are not competitive and, therefore, the ILECs are able to leverage their market power and prevent customers from using competitive alternatives.

B. The ILEC Discounts Are Not Cost-Justified

These discounted pricing plans might be acceptable if they were based on demonstrated cost savings. The ILECs have, however, produced no evidence to show that a customer's purchase of large numbers of special access circuits in a variety of locations results in any cost savings to the ILEC, much less the 50% discounts available through some plans. Moreover, there is no reason to conclude that the purchase of multiple DS1 or DS3 circuits on diverse routes throughout an ILEC's territory would result in anything more than *de minimus* cost savings. There are a number of scenarios in which cost savings likely would result – the purchase of additional capacity on the same route or the purchase of multiple circuits to a single building or office park – however, the plans at issue are not structured that way. Rather, they are based simply on the number of circuits purchased throughout the entirety of the ILEC's territory. In a competitive market, any discounts offered by an ILEC would be justified by the cost savings, if any, resulting from the customer's bulk purchases. Here, there is simply no evidence or reason to believe that the purchases generate cost savings to the ILECs. In the absence of such evidence, the existence of these plans, with their substantial discounts unsupported by cost savings, is further evidence of the ILECs' continuing monopoly over special access.

ILECs make much of their contract tariffs, explaining that even if the pricing flexibility base rates are stable or increasing, contract tariffs provide special access customers with steep discounts. These discount plans, however, come replete with numerous strings that tie future purchases to existing demand for existing services on incumbent providers. They mark a

substantial move away from generally available prices and flexible terms that would force the ILEC to compete on price for business on a circuit-by-circuit basis. The fact that virtually all RBOCs have implemented and expanded these discount plans is evidence that they increase profits over their alternatives. In other words overall prices must be higher, and profitability greater under these plans than they would have been otherwise, or the RBOCs would not have implemented and expanded them. Indeed, these plans have proven so successful in limiting entry and price competition that industry participants have referred to such plans as "CAP Killers."

IV. PRICING AND PROFIT DATA SHOW FUNDAMENTAL MARKET FAILURE

A. WilTel's Analysis Reveals Fundamental Market Failure In Special Access Pricing

Based on the WilTel analysis discussed above, showing that RBOCs charge higher prices for service terms and conditions that generally match those offered by CAPs, and the fact that RBOCs have not lost substantial market share, one must conclude that one or more of the following are at issue:

1. RBOC and CAP access are not close substitutes.
2. RBOC revenue commitment plans via lower pricing or commitment levels have locked up sufficient demand that services do not migrate away from incumbent providers.
3. CAPs do not offer service in a significant number of locations relative to the whole.

Given these empirical observations, it is clear that the market fails to discipline RBOC prices in a manner consistent with (or even remotely approximating) those of a truly competitive market. Thus, from an economic perspective, the market also fails to deliver service at prices reflective of underlying cost, and output/demand is less than optimal. Because special access is a critical component in offering a wide variety of voice, data, and video services, such a failure is

likely to have the downstream impact of limiting demand for new and innovate services that drive growth in the national economy.

B. ARMIS Data Shows That ILECs Enjoy Monopolistic Profits

The ILECs' extraordinarily high rates of return on special access services, as shown by the ARMIS data, also demonstrate that the ILECs retain market power over special access services. The ILECs argue that the ARMIS data is flawed.[98] WilTel does not intend to address the ILECs' arguments regarding the ARMIS data fully, but refers the Commission to the Reply Comments filed by the Joint CLECs in this proceeding.[99] It bears mentioning, however, that the ILECs rely on ARMIS data when it benefits them (such as when it shows that UNE prices are too low), and they have stressed the quality and reliability of that data in such settings.[100] Similarly, the ILECs cannot claim that the purported misallocation of costs to the Common Line category inflates ARMIS-based rates of return when in other proceedings they have stated that special access costs are not being misallocated.[101] In any event, even if there are misallocations, it is more likely that costs from other ILEC services are being improperly assigned to special access than the reverse.[102]

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[98] Verizon Comments, at 17; SBC Comments, at 24; BellSouth Comments, at 8; Qwest Comments, at 10.

[99] See Joint CLECs' Reply Comments, WC Docket 05-25, at Section I.B.

[100] *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM Docket No. 10593, Comments of the Ad Hoc Telecommunications Users Committee, at 29-30 ("*Ad Hoc Users Comments*").

[101] *Ad Hoc Users Comments*, at 30.

[102] ETI has explained that for 2003, the new investment allocated to the special access category for the BOCs was roughly one third of their total interstate net investment and approximately 40% of their combined Common Line and Special Access Investment categories. ETI White Paper, at 33. ETI stated that because there are fewer than 4-million special access loops and associated interoffice transport facilities, compared to more than 158-million Common Line local service loops in the BOCs' operating territories, the investment allocated to special access is disproportionate to the number of special access loops as a percentage of total loops. *Id*. The discrepancy between the number of loops used for special access and the amount of interstate investment assigned to those loops raises suspicions that costs are being overallocated to the special access category. *Id*.

In addition, while the ILECs claim that costs are misallocated, they have ignored the Commission's invitation to adjust the ARMIS data and recalculate the growth rates.[103] Instead, the ILECs attack the ARMIS data and its uncomfortable conclusions. These actions are highly suspect as the ILECs certainly have the means to undertake the analysis the Commission proposed. Absent any attempt by the ILECs to do so, the Commission should presume that the ARMIS data and rates of return are accurate.

V. THE RBOCS' REQUESTS FOR REGULATORY RELIEF MUST BE REJECTED

A. Further Phase II Relief Is Unwarranted

Based upon its claims that there is extensive competition for special access services and that its prices have not substantially increased, BellSouth requests that the Commission grant Phase II pricing flexibility everywhere and discontinue price regulation for special access after two years.[104] The Commission should reject BellSouth's request and should deny any further regulatory relief to the ILECs. The evidence is clear that ILEC special access prices have, at best, decreased slightly. BellSouth even admits that some of its prices have increased. Moreover, the ILECs continue to impose restrictive contract terms and conditions that further limit competition. Given sharply declining costs, a competitive market would have resulted in substantially lower prices and the elimination of onerous contractual terms. Given that pricing flexibility has not resulted in the competition or cost-based pricing that the Commission anticipated, there is no reason to believe that further deregulation will result in substantially lower prices for special access. Rather, a further reduction in oversight of the ILECs' special

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[103] *NPRM*, ¶ 29.

[104] BellSouth Comments, at 48.

access rates, terms and conditions is likely to lead to further abuses by the ILECs and continued stagnation of prices. Therefore, the Commission should significantly tighten the Phase II pricing flexibility rules as described in WilTel's Initial Comments and these Reply Comments.[105]

B. The Commission Should Not Eliminate Service Categories And Sub-Categories in the Special Access Basket

SBC proposes that the Commission restructure the special access basket to contain two service categories: "DS3 and below Channel Terminations to End Users" and "All Other." SBC argues that dividing the remaining services into two baskets correctly groups the price cap services that face the most similar competitive conditions.[106] SBC's proposal would eliminate separate categories for Voice Grade, WATS, Metallic services, and Audio & Video service in favor of its proposed "All Other" service category and would remove OCn services from price-cap baskets entirely.[107] Verizon goes even further and recommends that the Commission eliminate all service categories and sub-categories within the special access basket.[108]

The Commission should reject these proposals. Instead, it should adopt WilTel's proposal to establish separate baskets for DS1 and DS3 special access services and to create four categories within these baskets: (1) special access channel terminations between the LEC end office and the customer premises (loops); (2) channel mileage between LEC central offices (transport); (3) special access channel terminations between the IXC POP and the LEC serving

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[105] Moreover, contrary to the implications of the ILECs, there is nothing preventing them from reducing prices of their own accord.

[106] SBC Comments, at 62.

[107] SBC Comments, at 63.

[108] Verizon Comments, at 37.

wire center (entrance facilities) and (4) any other special access product.[109] High-capacity services above the DS-3 level should be placed in a separate basket that does not include categories insofar as the Commission's determination is correct that the market for these services is competitive.[110] Other retail services should have a separate basket as well.

The Commission also should establish a separate basket for mass market broadband and DSL services. These services compete directly with cable offerings, existing in a duopoly that, for now, is price competitive, unlike traditional special access services.[111] If the ILECs want to compete for these mass market customers by lowering these prices, they should not be permitted to subsidize these services by further inflating special access charges. To prevent any threat of such anticompetitive conduct, the costs and revenues associated with mass market broadband and DSL services should be assigned to a separate basket.

C. Phase II Pricing Flexibility for Special Access Should be Applied at the Wire Center Level Based on the Existence of Multiple Fiber-Based Collocators

As the Commission recognized in its 1998 *Pricing Flexibility Order*, competition does not occur uniformly in an MSA. Rather, there may be no competitive alternatives for special access in some wire centers in an MSA that is nevertheless eligible for Phase II pricing flexibility. Nothing in the ILECs' comments in this proceeding alters those conclusions. Accordingly, the Commission must discard its MSA approach to grants of pricing flexibility in favor of a wire center analysis for Phase II pricing relief for interoffice transport.

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[109] The 5 percent upper pricing band that currently applies to special access services and categories should also apply to the baskets and categories being proposed herein "to protect ratepayers from substantial changes in services rates." *See LEC Price Cap Order* paras. 223-24; 47 C.F.R. § 61.47(e).

[110] *See, e.g., Triennial Review Order*, ¶¶ 315 & 389.

[111] *NPRM*, ¶ 52.

It is also clear that the triggers adopted in the 1998 *Pricing Flexibility Order* do not accurately measure where competition in an MSA is sufficient to constrain BOC pricing and produce forward-looking pricing. As discussed above, prices have not declined significantly where Phase II pricing flexibility has been granted.[112] This fact alone invalidates the current triggers and MSA-wide approach for granting pricing flexibility.

The Commission has already developed triggers that identify where competitive transport alternatives may exist on a route-by-route basis. In the *Triennial Review Remand Order*, the Commission adopted a wire center approach for measuring impairment for access to interoffice transport as an unbundled network element.[113] Under that approach, impairment for interoffice transport is determined by reference to the number of access lines or fiber-based collocators in the wire centers on both ends of the route.[114] While this approach is not entirely accurate for identifying the presence of effective competition, it is an improvement over the current MSA approach because transport competition would be identified on a basis closer to the way that it actually occurs, *i.e.* on a route-by-route basis. Accordingly, the Commission should establish a wire center approach for determining eligibility for pricing flexibility for interoffice transport that requires multiple (three or more) fiber-based collocators that are independent of the ILEC, that have actually deployed competitive facilities, and that are offering them to competitors. Only in this way will actual, rather than hypothetical, competition exist for special access services.

D. Pricing Flexibility Triggers Should Not be Modified to Measure Non-

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[112] Joint CLECs' Comments, at 10-13.

[113] *Triennial Review Remand Order*, ¶111.

[114] Dr. Selwyn's Reply Declaration includes a discussion of the standard adopted by the Commission in the Triennial Review Remand Order. Selwyn WilTel Reply Dec., at ¶¶ 28-30.

Collocated CLEC Networks or Intermodal Competition

The Commission should reject SBC's and Verizon's requests to modify triggers for pricing flexibility to take into account non-collocated CLEC networks and intermodal competition.[115] These carriers have been arguing in the *Triennial Review Remand Proceeding* that business line density and fiber-based collocation are satisfactory proxies for revenue opportunities that will adequately predict the actuality and potential for competition.[116] They go so far as to contend that business line density and fiber-based collocation are sufficiently acceptable proxies for competition to the extent that it does not matter what methodology the Commission uses in counting business lines, as long as it is consistently developed and applied.[117] This advocacy negates their claim in this proceeding that fiber-based collocation triggers are inadequate to predict competition. Accordingly, the Commission should reject requests to modify pricing flexibility triggers in the ways requested by the ILECs.

E. RBOC Requests for X-Factor Should Be Rejected

In its Initial Comments, WilTel recommended that the Commission should make a productivity-based X-Factor a key feature of new permanent price cap rules. Because the ILECs threaten to reduce their investment in network efficiencies in the face of new price caps, it is even more important that the Commission reinstitute an X-factor to ensure that ILECs capitalize on the technological advancements of their suppliers to improve their productivity.

The ILECs argue against a special access specific X-factor because "[s]pecial access services are not produced on a stand-alone basis; they use the same network facilities and

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[115] Verizon Comments at 35; SBC Comments, Casto Declaration at 17 .

[116] Verizon Opposition to Petition for Reconsideration, WC 04-313, at 35-36; SBC Opposition to Petition for Reconsideration, WC 04-313, at 19-20.

[117] *Id.*

managerial functions as all of the other outputs of a telecommunications firm."[118] This argument actually militates in favor of a specific X-factor. As the *Ad Hoc Committee* showed,[119] high special access returns are subsidizing the costs of other competitive or quasi-competitive services. Rather than using their excess earnings from special access to undermine competition, the ILECs should be sharing these benefits with consumers. The X-factor would do that.

Similarly, SBC argues that the proposed 5.3% X-factor is incorrect because it was developed 10 years ago and covered all price cap services, not just special access. If anything, this suggests that 5.3% is too low, since recent ILEC technology enhancements focus on last mile facilities (hybrid loops, FTTC, FTTH), which would have a greater effect on special access service efficiency than it would for other price cap services like switched access or transport.

To address these shortcomings, the Commission should re-impose a productivity-based X-factor in the price cap formula to ensure that rates continue to decline relative to GNP-PI.[120] The Commission should apply the X-factor prospectively and retroactively to 2004, when the Commission eliminated the X-factor and froze the PCI.

VI. CONCLUSION

The Commission's 1999 decision to grant pricing flexibility for special access service was granted based on the widely-accepted premise that competition would continue to grow and that the ILECs would be forced to move to cost-based pricing. Quite simply, things did not work out as expected. For a myriad of reasons, the rosy predictions did not come true and special access remains a *de facto* ILEC monopoly. Despite rapid cost decreases, special access prices

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[118] Verizon Comments, at 42. *See also* Qwest Comments, at 9.

[119] ETI White Paper, at 33.

[120] *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, at ¶ 75 (1990) (subsequent history omitted) ("*LEC Price Cap Order*").

have declined slightly, if at all, and the ILECs have an almost unfettered ability to impose anticompetitive terms and conditions that throttle competition in the special access market.

It is too late to expect substantial competition to develop in the special access market. The impending elimination of AT&T and MCI as competitors to the ILECs will remove the only meaningful national competitive providers of special access, and the substantial practical barriers to entering the special access market make it unlikely that a competitor will emerge in the near future. Further, the likely reduction in UNE offerings that will result from the Commission's recent orders will make competitors even more dependent on special access.

The Commission must therefore address the reality of the special access market as it is, acknowledge the market power of the ILECs, and ensure the existence of competition by regulating the ILECs as dominant providers of special access. Given the Supreme Court's determination last year that antitrust courts should stay their hands in deference to regulators with respect to competition issues in the telecommunications industry, noting that "regulation significantly diminishes the likelihood of major antitrust harm,"[121] it is especially critical that the FCC take effective steps to prevent anticompetitive practices by the ILECs.

Based on the evidence WilTel documents herein, WilTel is driven to the clear conclusion that the Commission must take action to ensure that the ILECs can no longer abuse their market

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[121] *Verizon Comm'ns v. Trinko*, 540 U.S. 398, 412 (2004), *quoting Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990). The Commission should be especially vigilant to ensure that the ILECs do not persuade the FCC and the courts to engage in an "Alphonse and Gaston" routine in which each defers to the other. Before Verizon succeeded in persuading the Supreme Court in *Trinko* that it should not allow the application of the antitrust laws to its allegedly anticompetitive conduct because of the existence of a regulatory remedy, it successfully argued just the opposite to the Commission, arguing that the Commission should not apply more stringent regulatory safeguards because if Verizon were "to engage in anticompetitive conduct, carriers would of course be able to resort to private remedies under . . . the treble-damages remedy of the federal antitrust laws." *In Re Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000), at ¶ 24.

power in the special access market and to ensure that, where feasible, competition does replace regulation and a means of achieving efficiency-maximizing prices and service quality. There are three principal steps to the reform required.

1. In areas where the FCC has not granted pricing flexibility, price caps need to be reinitialized to reflect forward-looking incremental cost and an aggressive X-factor is needed to provide incentive for further productivity and cost improvements by the ILECs.

2. In areas where the FCC has granted pricing flexibility ILECs should be free to deaverage their prices by lowering them, but the price cap rate should act as a ceiling on special access prices even where flexibility is granted. WilTel would support deaveraging in smaller geographic areas so long as the same prices for standard terms are available to all special access customers.

3. Price competition for special access should be reintroduced. For CAP entry to exercise a force for obtaining efficient pricing and improved service quality then commitment-based, growth-based, "CAP Killer" tariffs and contract tariffs must be eliminated. While ILECs facing rivalry should be allowed to compete in price and service quality for new and existing services, the use of commitment-based, growth-based, and volume-based discounts forestalls any real competition and discourages entry because it eliminates the ability for customers to select a service provider based on current price and service-level criteria. Simplifying pricing to a form in which ILECs simply compete for the next deal based solely on the price and service for that particular deal will create an environment where the best provider for that particular deal will win. Today, despite market entry, real competition is stillborn. Even where the entrant offers a superior combination of price and quality, this is overshadowed by the leverage that the ILEC possesses by virtue of its commitment plans

For the reasons set forth above, the Commission should reform its rules governing special access pricing.

Respectfully submitted,

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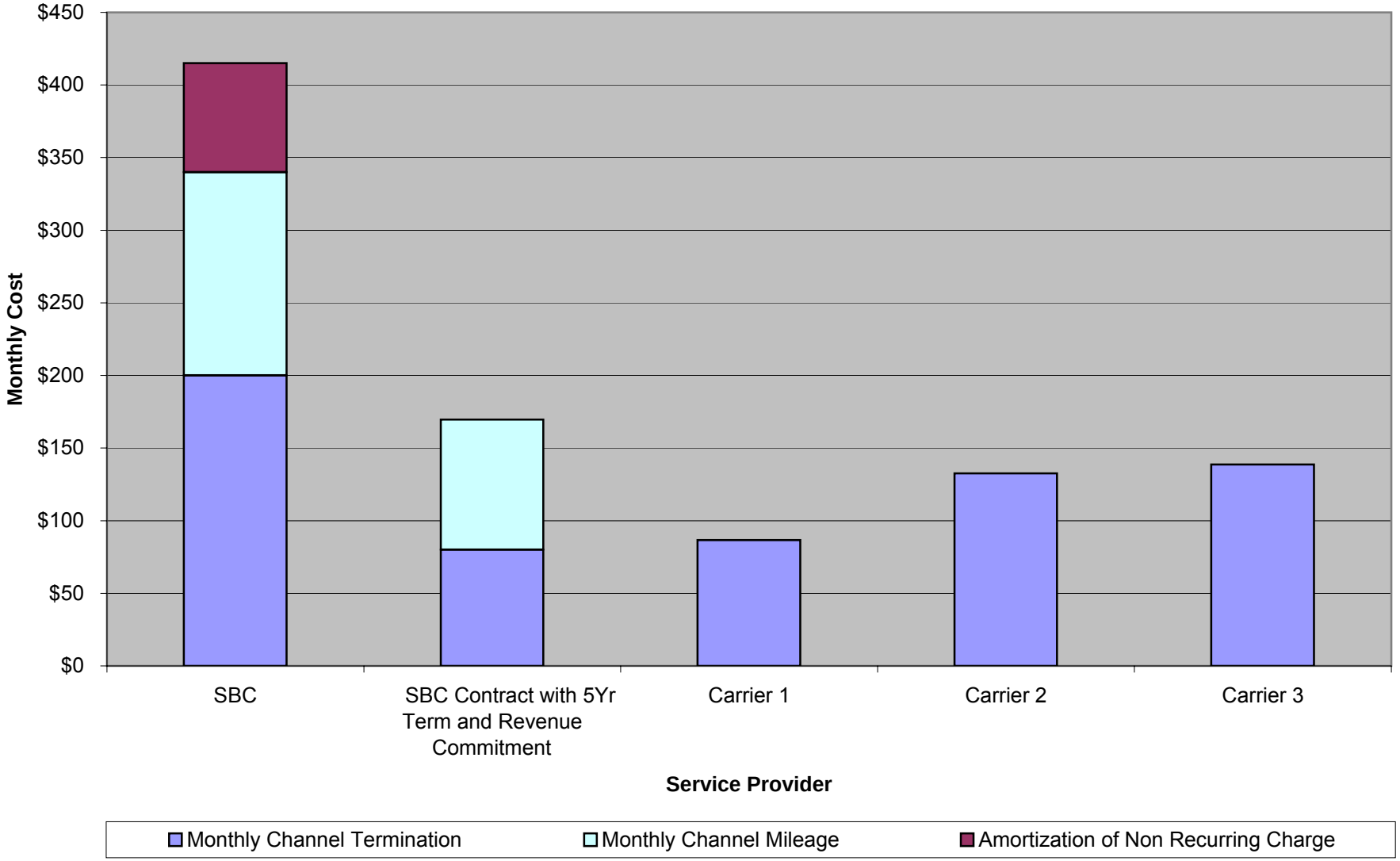
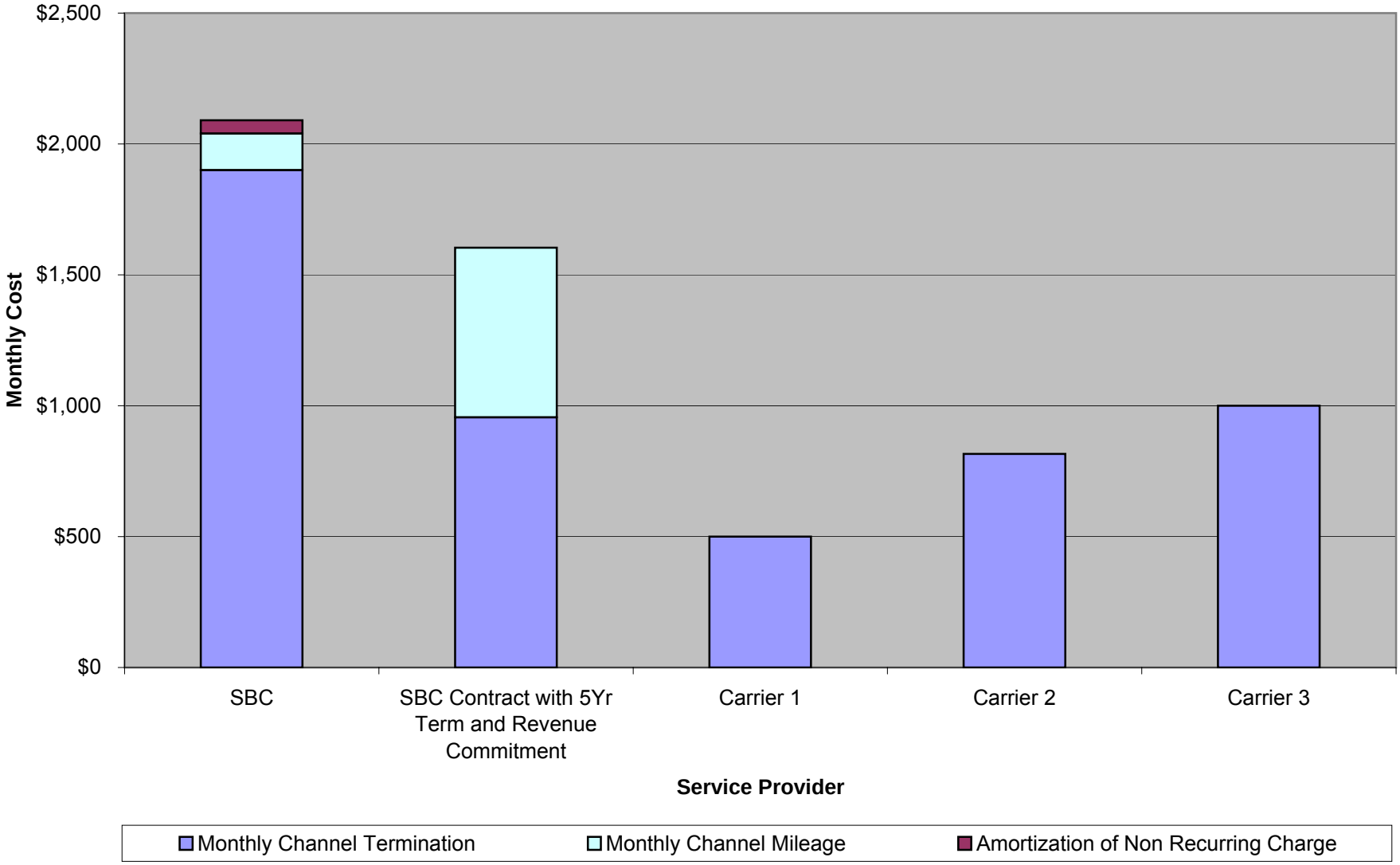
Dated: July 29, 2005

EXHIBIT 1

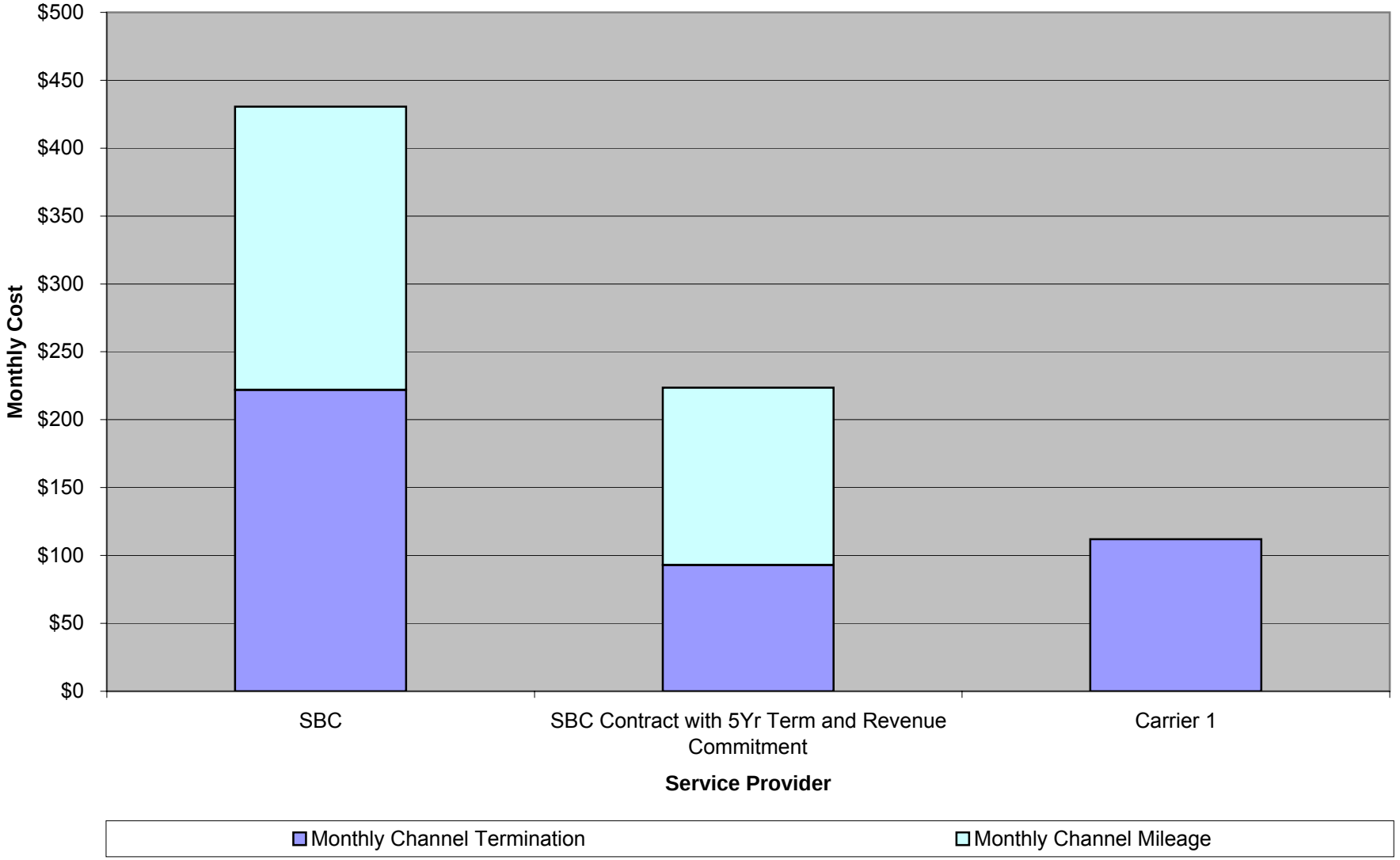
Comparison of DS1 Monthly Charges for a 12 Month Period - Oklahoma City Market
Includes 5 Circuit Miles



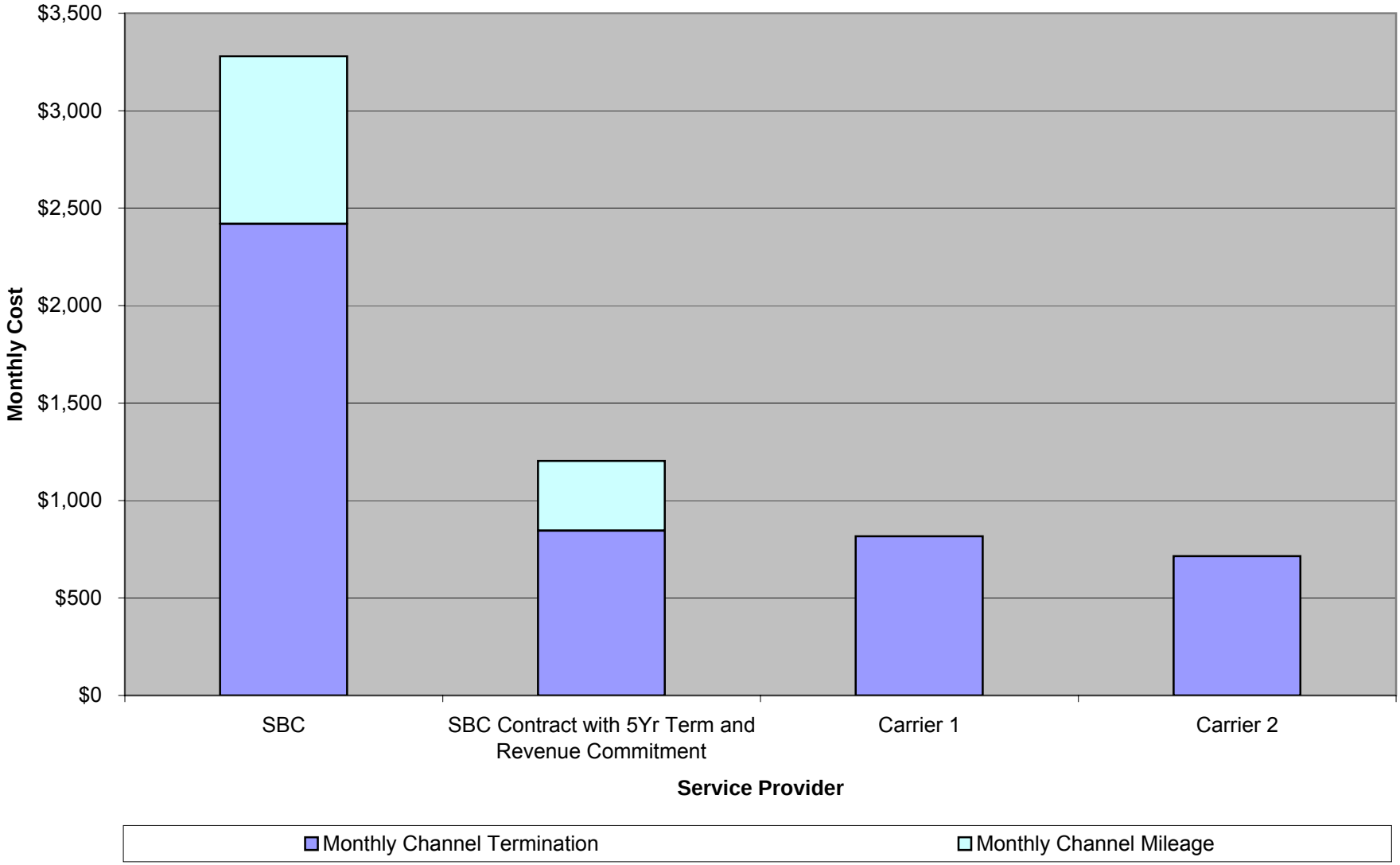
Comparison of DS3 Monthly Charges for a 12 Month Period - Oklahoma City Market
Includes 5 Circuit Miles



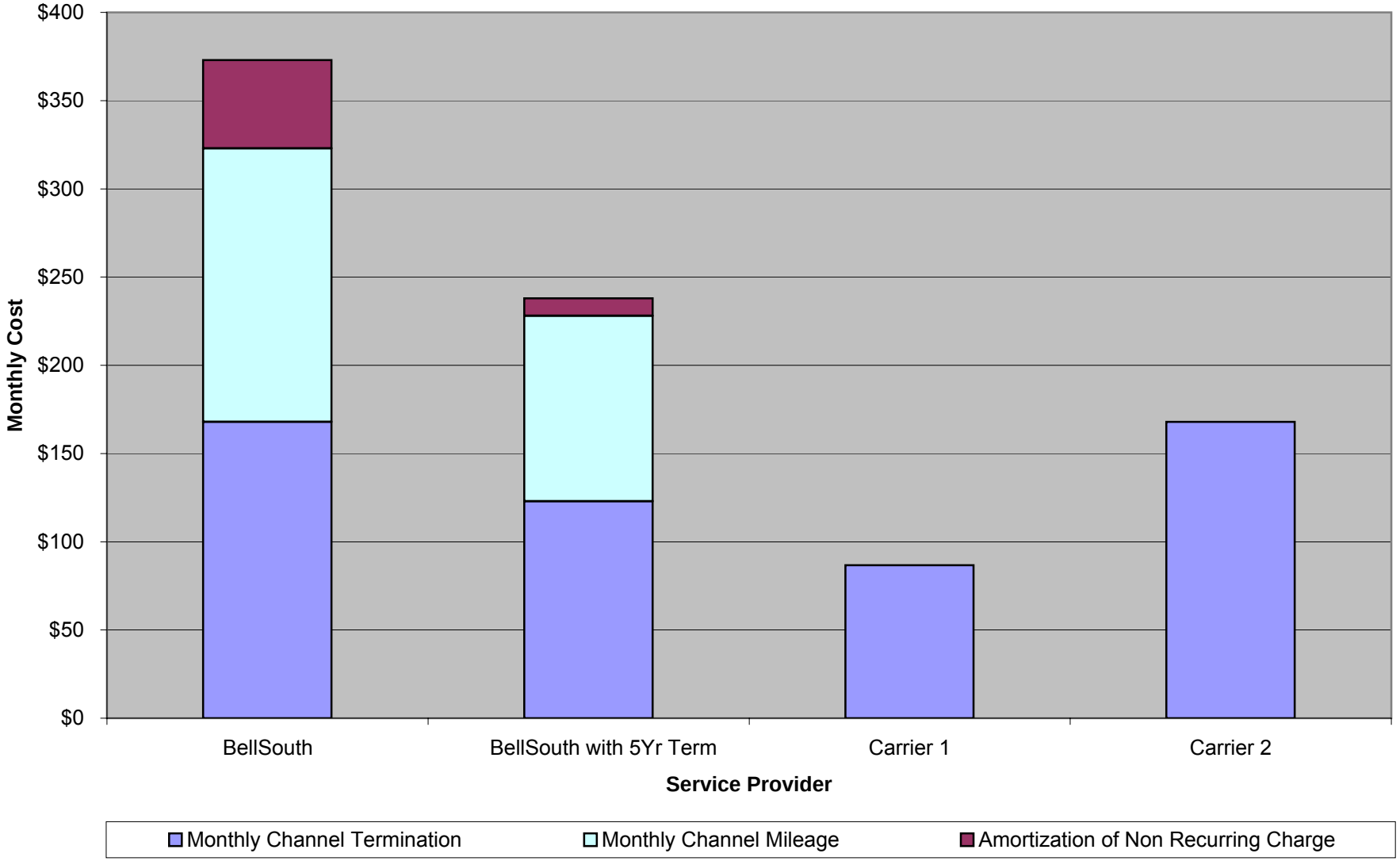
Comparison of DS1 Monthly Charges for a 12 Month Period - Columbus Market
Includes 5 Circuit Miles



Comparison of DS3 Monthly Charges for a 12 Month Period - Columbus Market
Includes 5 Circuit Miles



Comparison of DS1 Monthly Charges for a 12 Month Period - Atlanta Market
Includes 5 Circuit Miles



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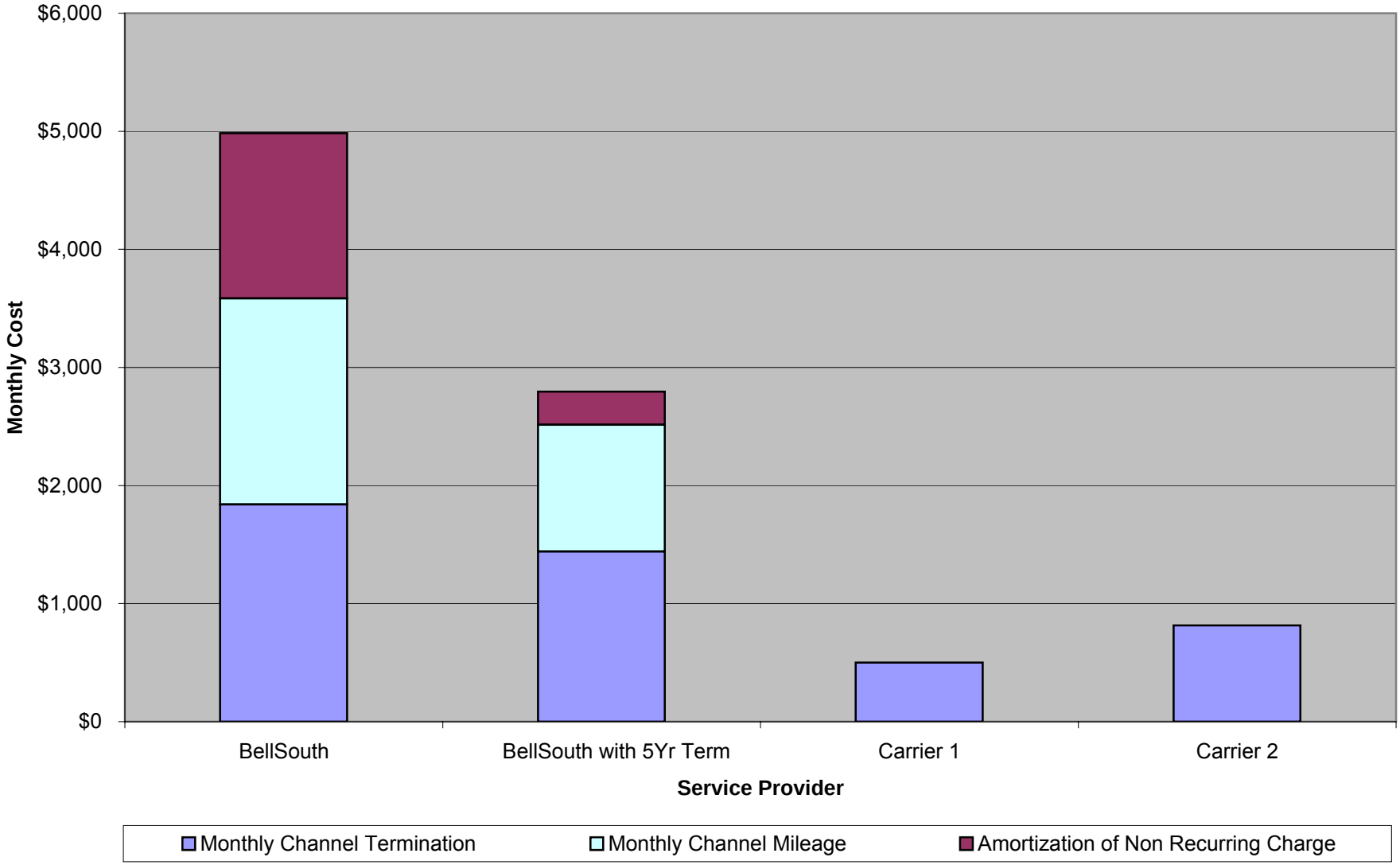
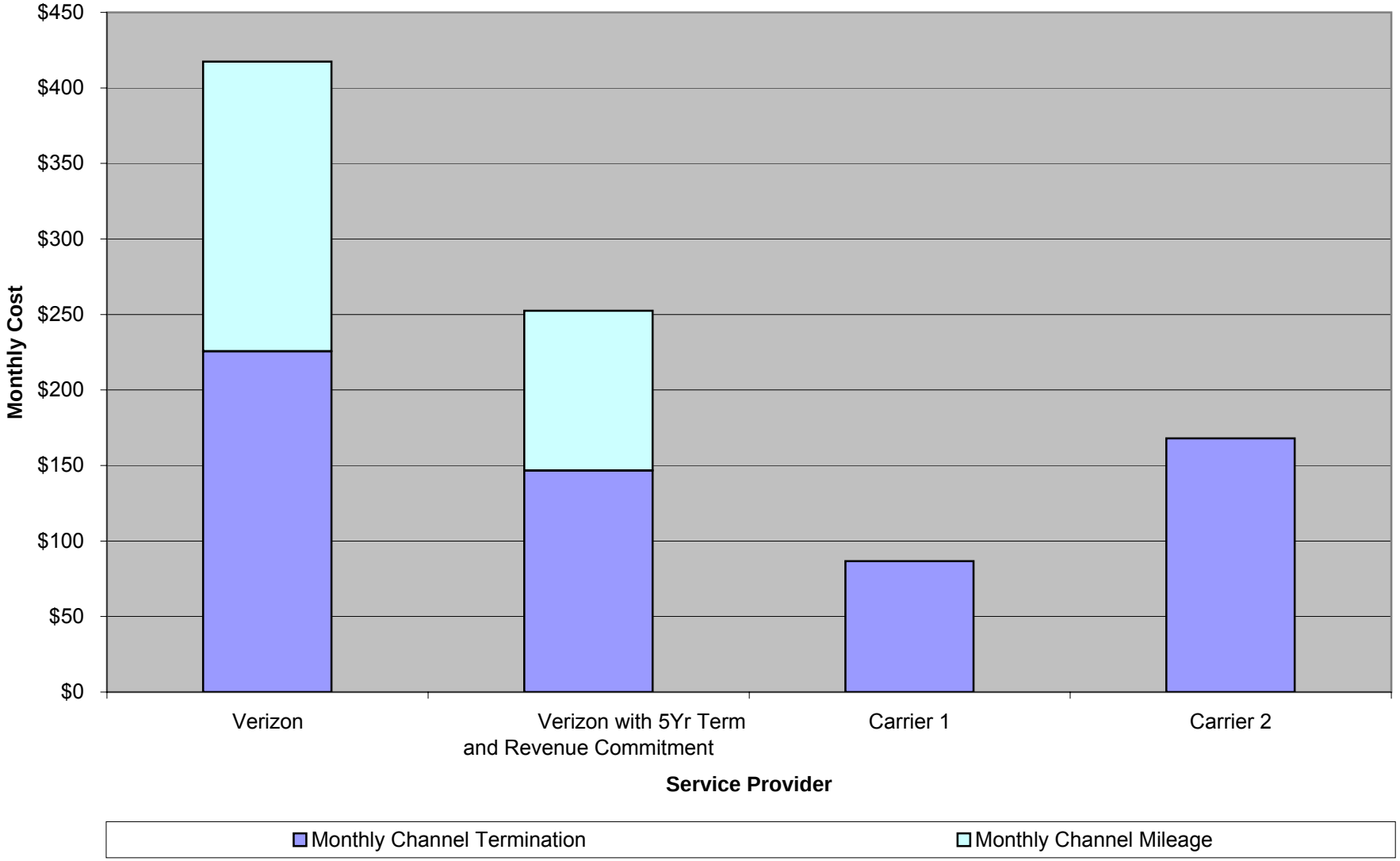
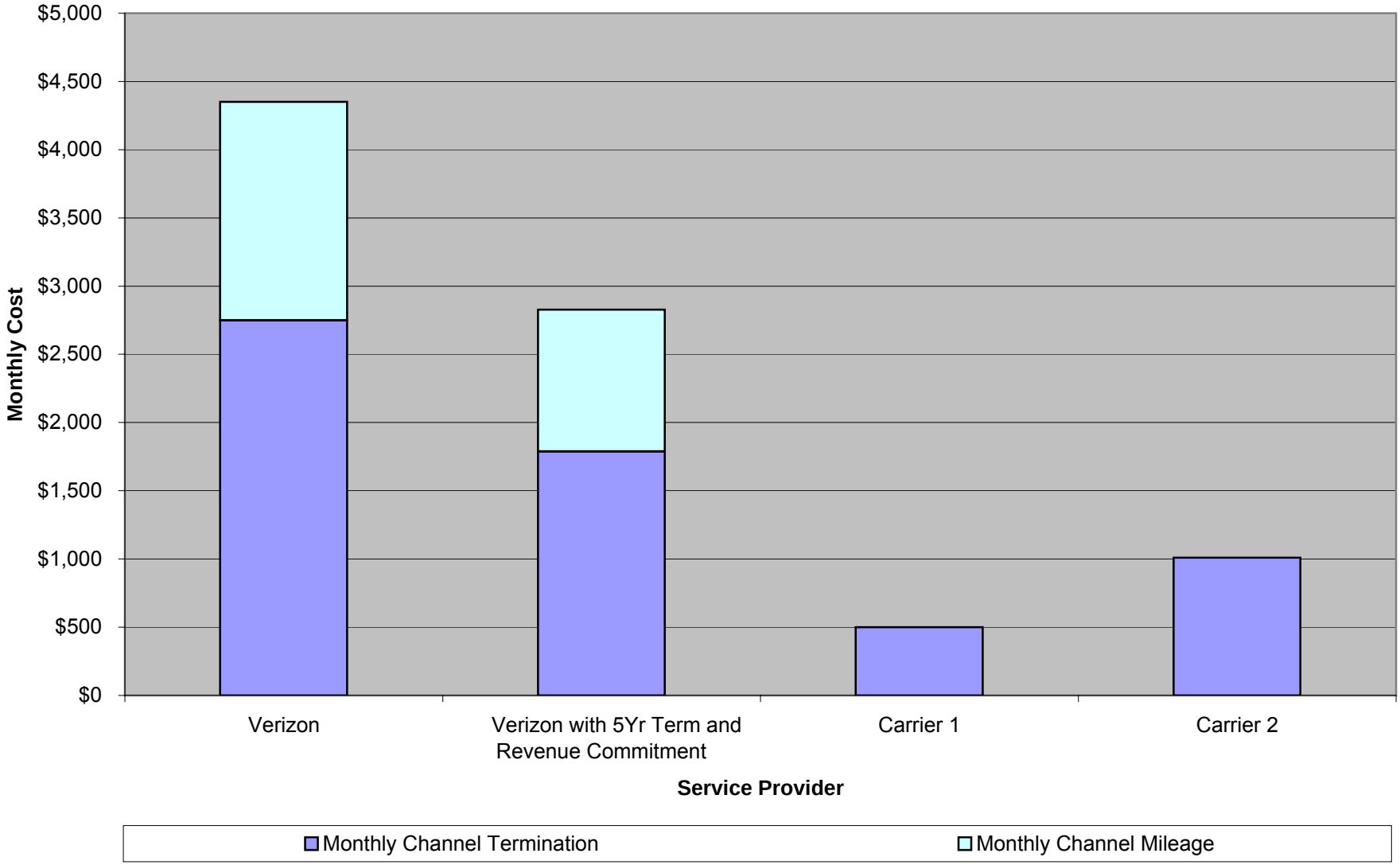
Includes 5 Circuit Miles



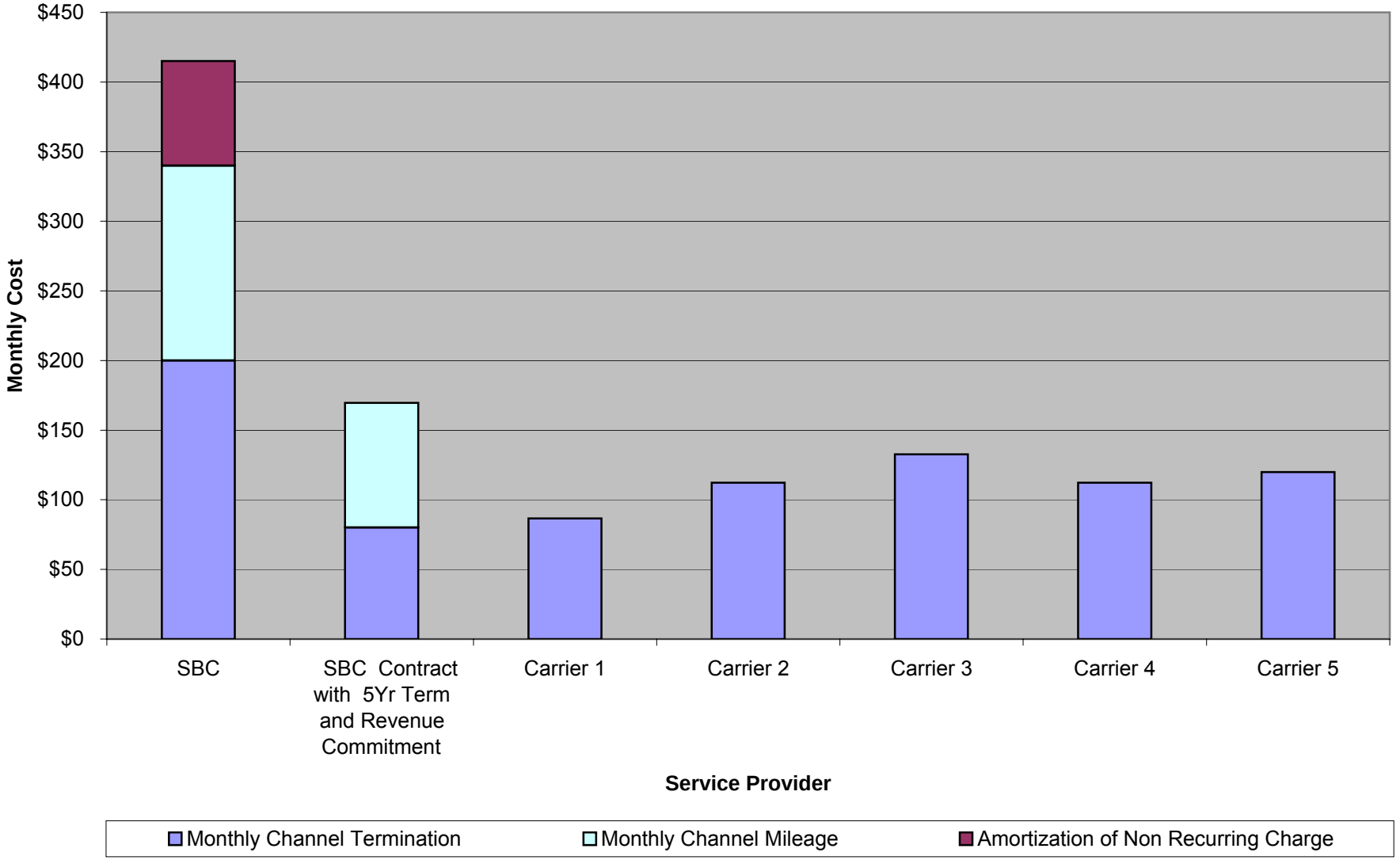
Comparison of DS1 Monthly Charges for a 12 Month Period - Richmond Market
Includes 5 Circuit Miles



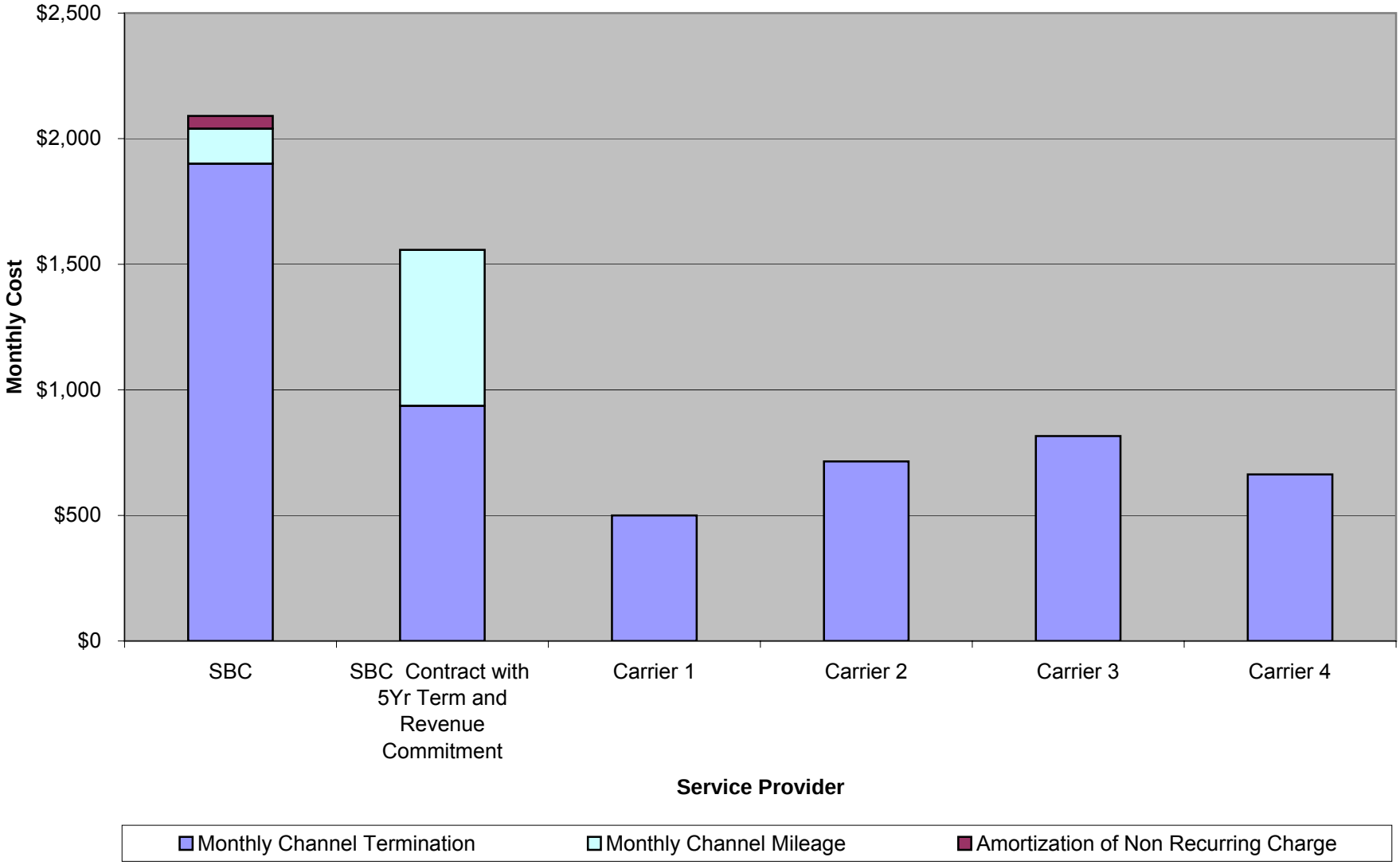
Comparison of DS3 Monthly Charges for a 12 Month Period - Richmond Market
Includes 5 Circuit Miles



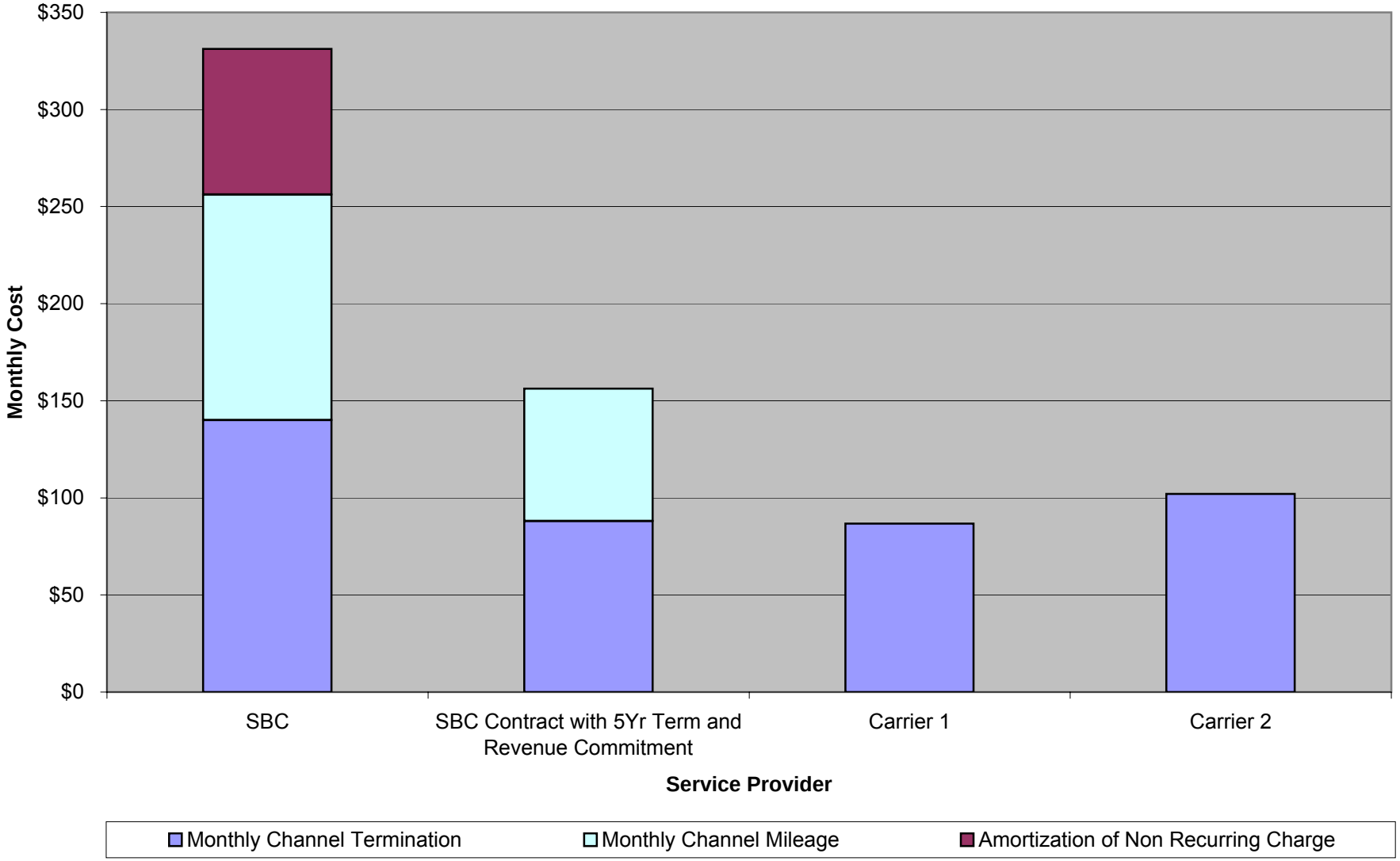
Comparison of DS1 Monthly Charges for a 12 Month Period - Dallas Market
Includes 5 Circuit Miles



Comparison of DS3 Monthly Charges for a 12 Month Period - Dallas Market
Includes 5 Circuit Miles



Comparison of DS1 Monthly Charges for a 12 Month Period - Sacramento Market
Includes 5 Circuit Miles



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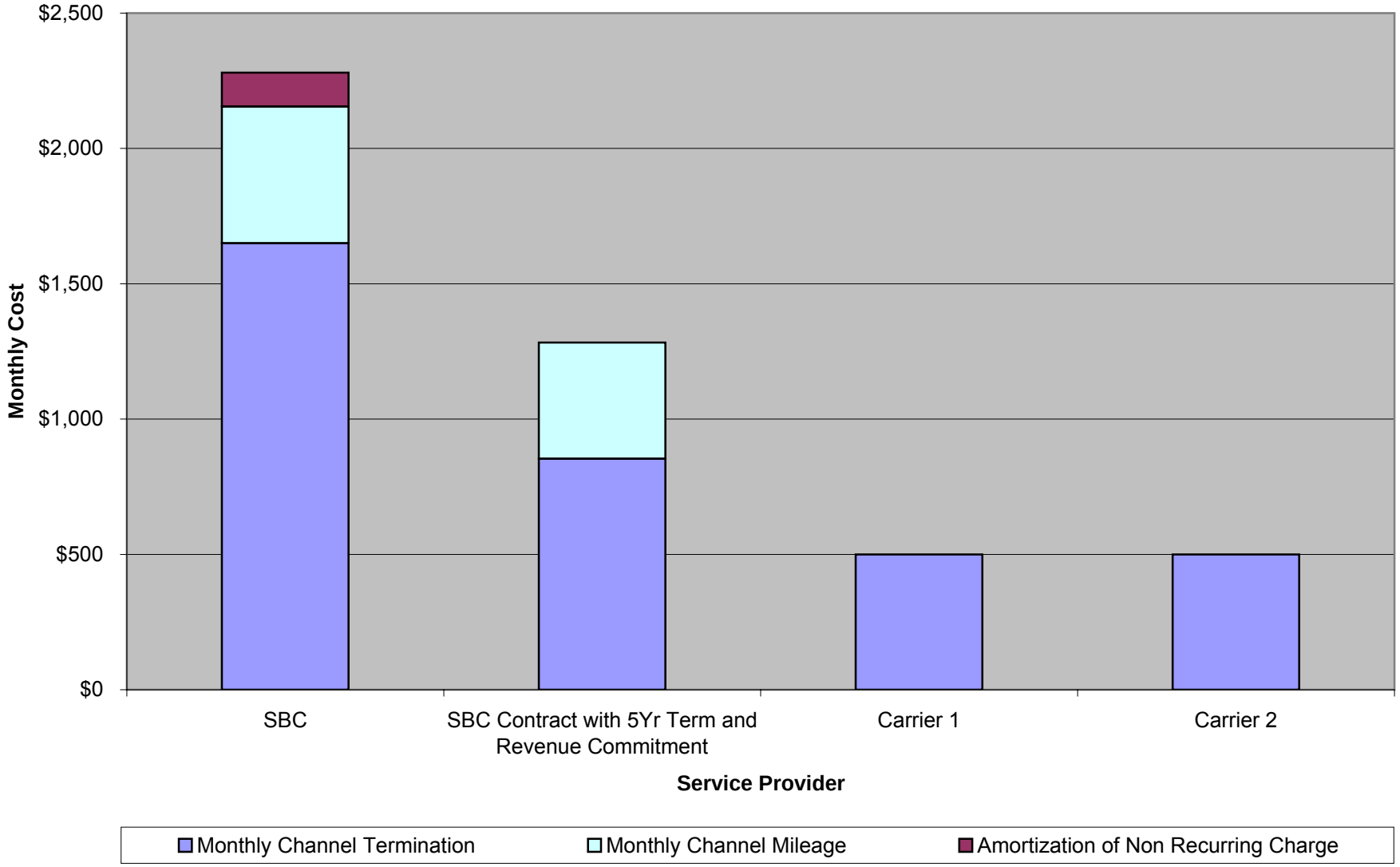
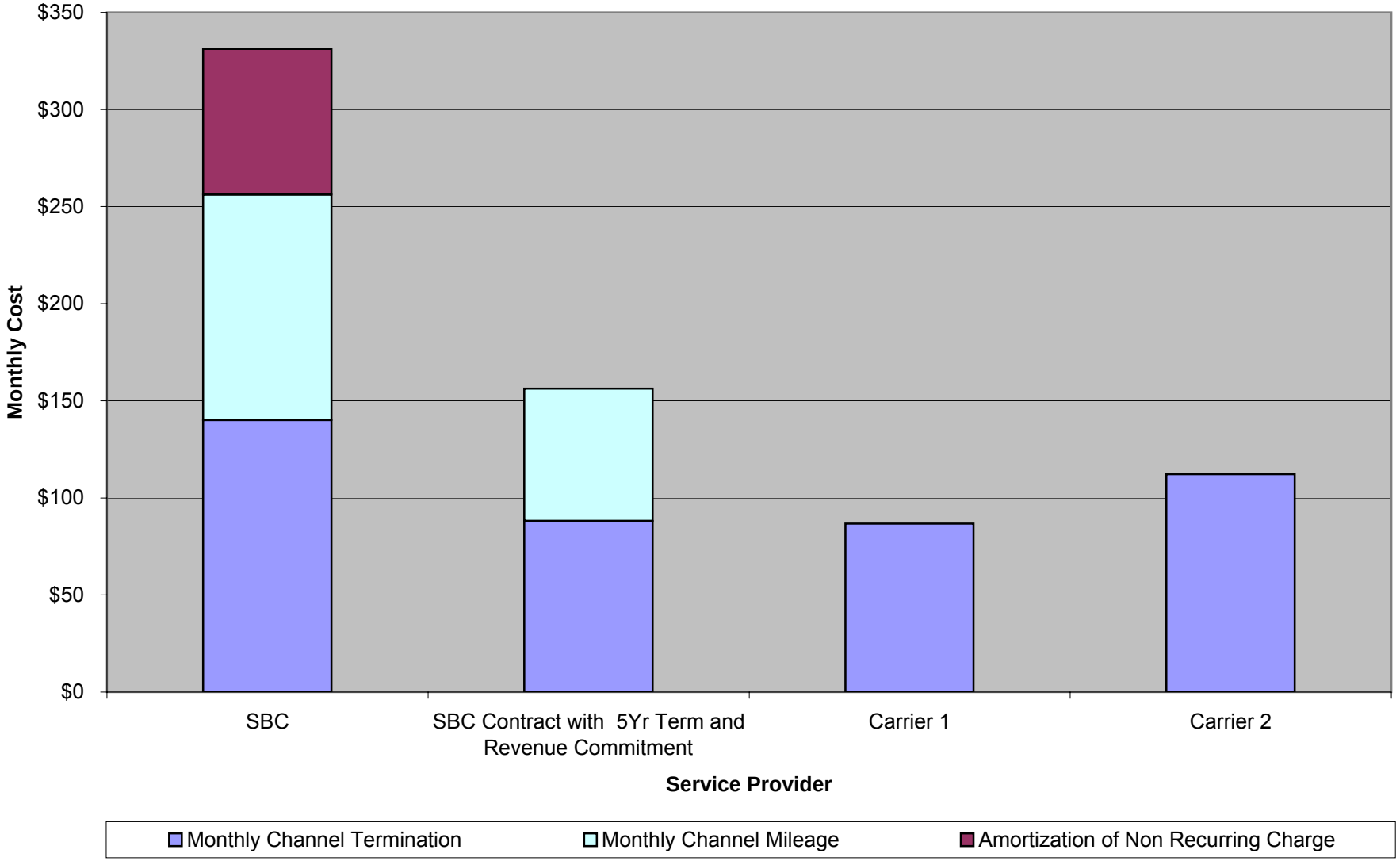
Includes 5 Circuit Miles



Comparison of DS1 Monthly Charges for a 12 Month Period - San Francisco Market
Includes 5 Circuit Miles



Comparison of DS3 Monthly Charges for a 12 Month Period - San Francisco Market
Includes 5 Circuit Miles

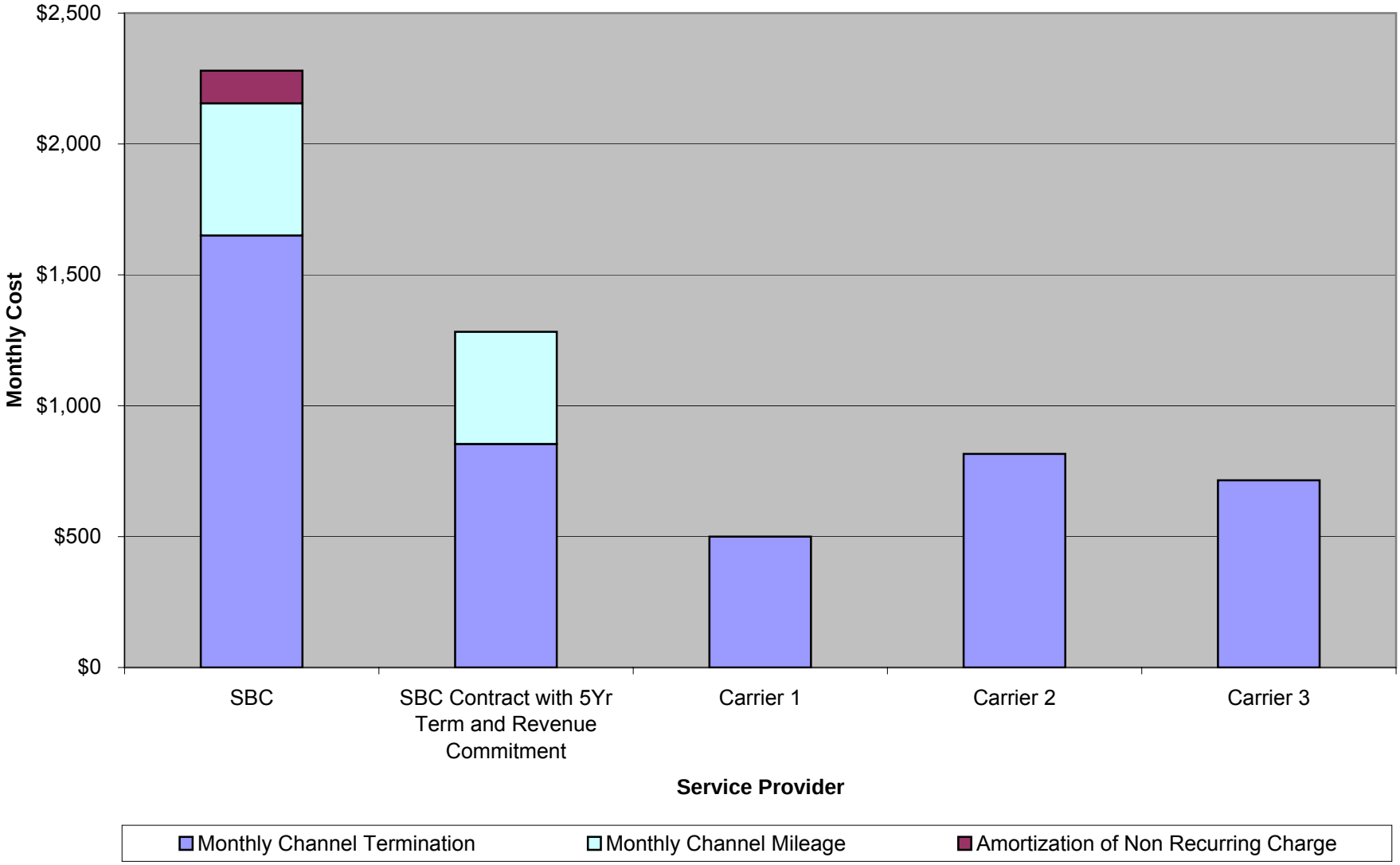


EXHIBIT 2

WILTEL REPLY EXHIBIT 2

AT&T AND MCI (TYPE I BUILDING LIST)

(Type I Service exists where the CAP provides service using on-net facilities rather than reselling the service of the ILEC)

[BEGIN CONFIDENTIAL]

DATA
[END CONFIDENTIAL]

Vendor	Total Unique Lit Buildings
AT&T	**[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**
MCI	**[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**
AT&T Local Situated With Other CAPs	**[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**
MCI Situated With Other CAPs	**[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**

REDACTED FOR PUBLIC INSPECTION

Based on building lists provided by AT&T and MCI, (WilTel uses this information for purchases of special access from these suppliers and other suppliers of special access), WilTel has determined that:

- WilTel's data indicate that CLECs serve about 25,000 unique building addresses.
- Together AT&T and MCI provide service to approximately **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** separate building addresses—nearly half of the building addresses available from CAPs.
- AT&T serves **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** buildings where no other CAP is available.
- MCI/ serves **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** separate buildings where no other CAP is available.
- AT&T and MCI represent the sole alternative supplier in fully one third of total buildings served by Competitive Access Providers.

EXHIBIT 3

Statistical Summary of Pricing Flexibility Contracts

PacBell

- 62 Contract Tariffs Altogether
  - 29 OCN level services
  - 23 Transport (interoffice) only
  - 2 Wireless companies only
  - 8 DS1 or DS3 Channel Termination (with interoffice, OCN included)
    - 6 require subscription to other SBC CTs and bundle services ordered thereunder into meeting revenue requirement
    - 2 bundle Los Angeles and San Diego MSAs together for purposes of meeting revenue requirement

SWBT

- 52 Contract Tariffs Altogether
  - 9 OCN/SONET
  - 32 Transport (interoffice) only
  - 3 Wireless/MSC only
  - 8 DS1 or DS3 Channel Terminations (with interoffice, OCN included)
    - 6 require subscription to other SBC CTs and bundle services ordered thereunder into meeting revenue requirement
    - 2 are very customer-specific

BellSouth

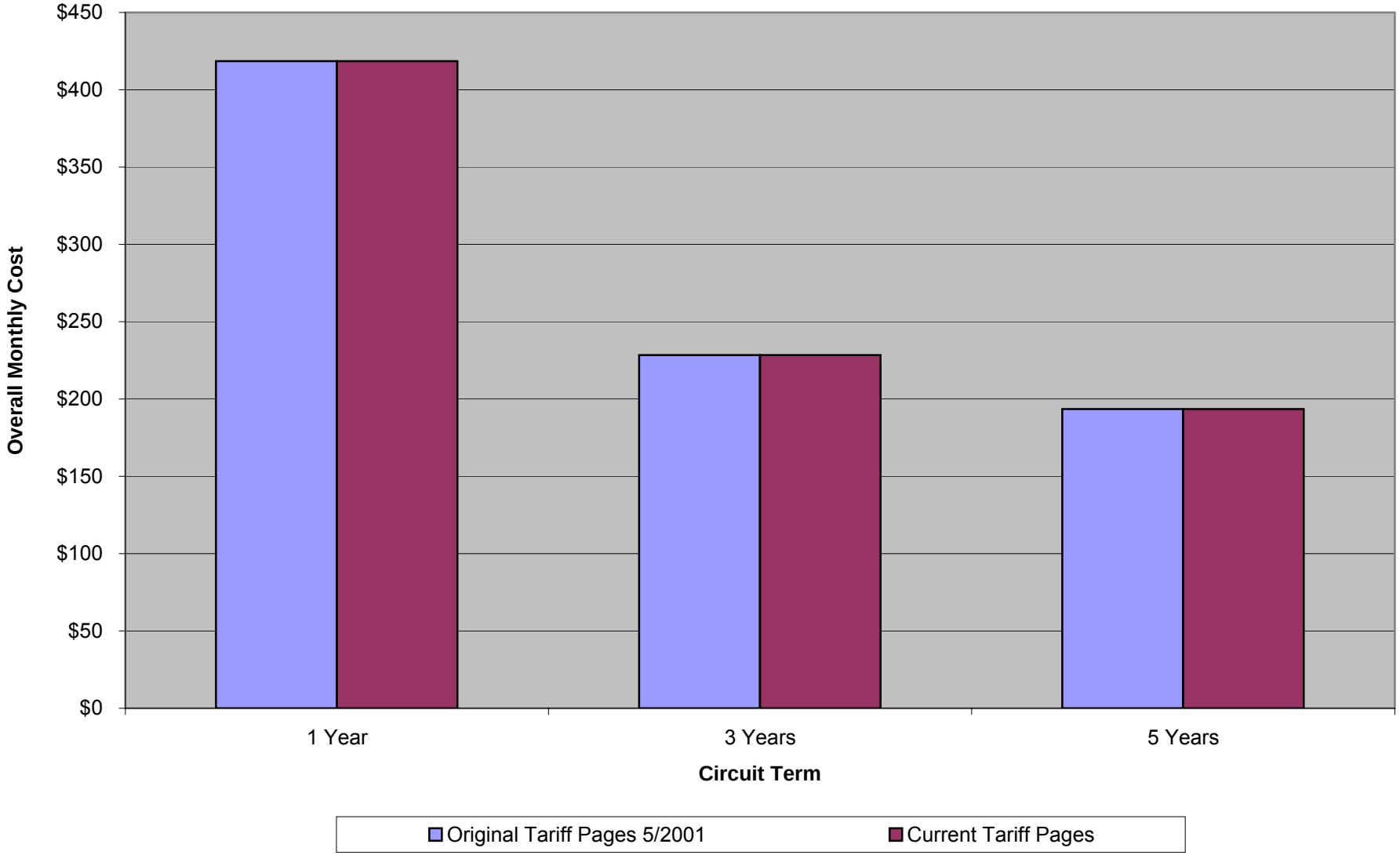
- 22 Contract Tariffs Altogether
  - 6 OCN/ADSL/ATM (2 require regional revenue or capacity commitment)
  - 1 Transport Only (requires regional revenue or capacity commitment)
  - 15 DS1/DS3 Channel Termination and/or Interoffice
    - All require regional revenue or capacity commitment

Qwest

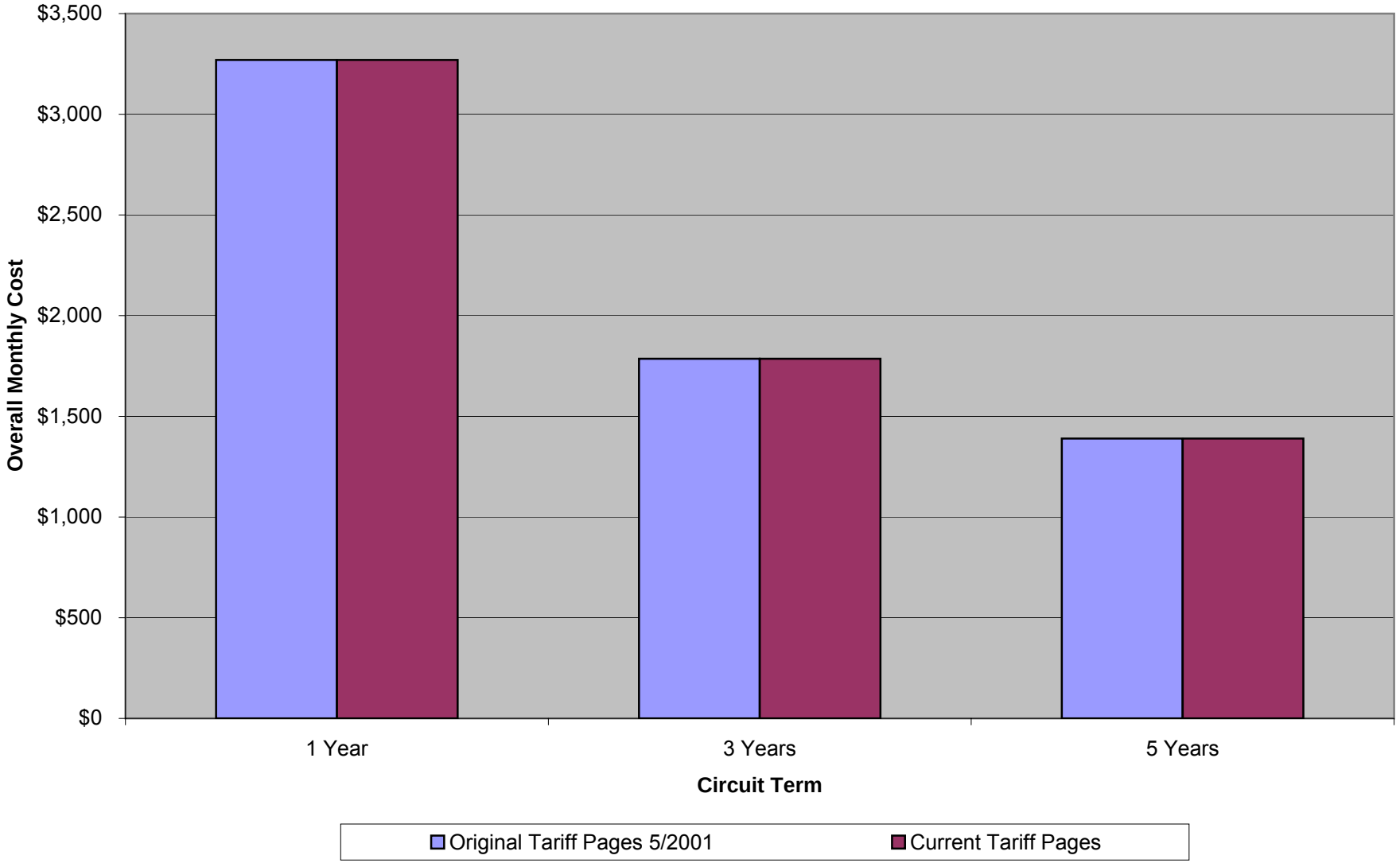
- 64 Contract Tariffs altogether
  - 45 OCN/Ring
  - 20 DS1/DS3 Channel Termination and/or Interoffice
    - 2 Limited to Military Installations
    - 7 Require Regional Revenue Commitment
    - 3 provide only for price protection and (two) for waiver of NRC
    - 4 require bundle with self-healing alternative route protection
    - Some (overlapping DS1/DS3 bullets above) are limited to renewals

EXHIBIT 4

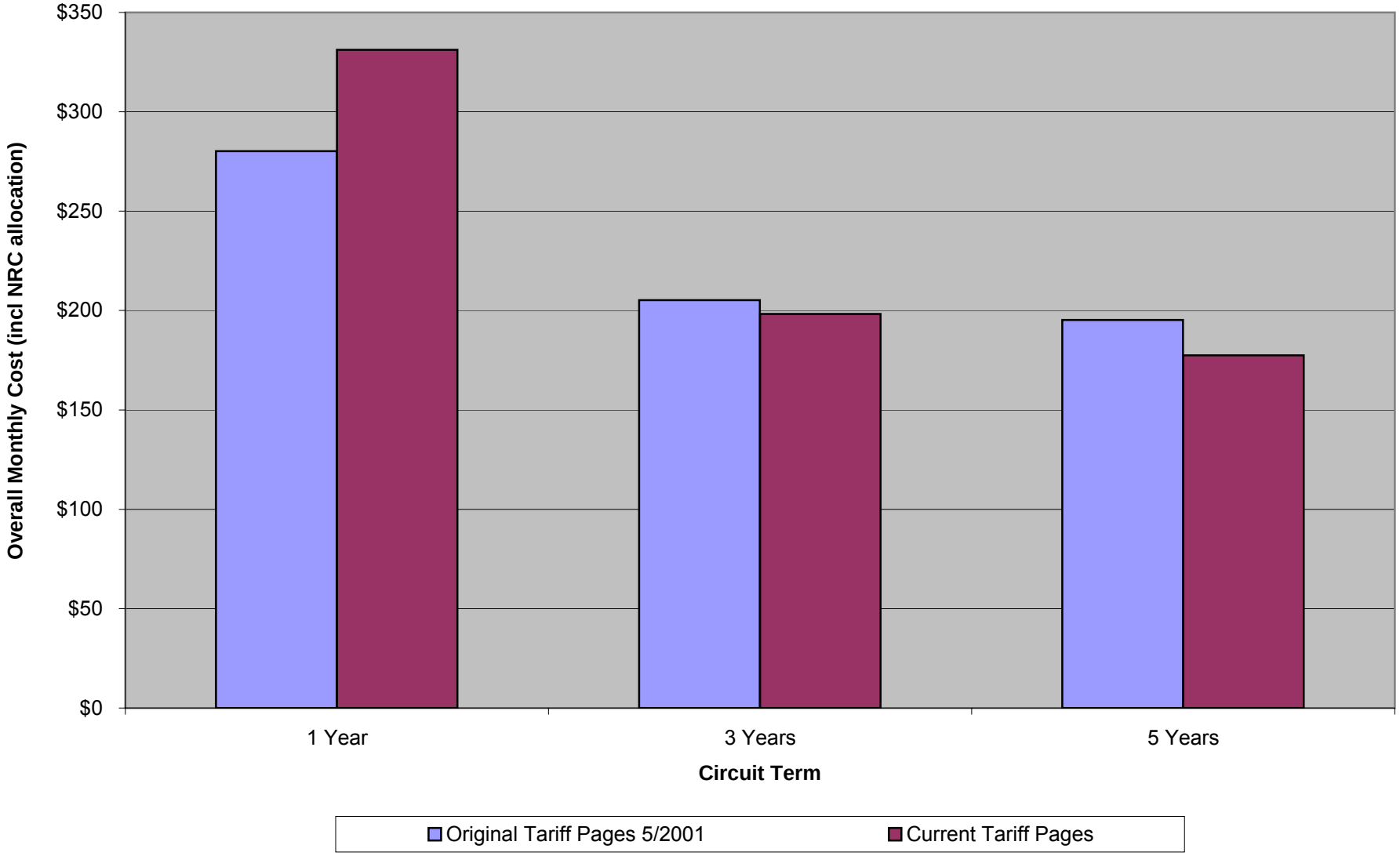
Time Series Comparison of DS1 Charges - IL Zone 2 - 5 Miles
Ameritech FCC 2



Time Series Comparison of DS3 Charges - IL Zone 2 - 5 Miles
Ameritech FCC 2



Time Series Comparison of DS1 Charges - Zone 1 - 5 Miles
PacBell FCC 1



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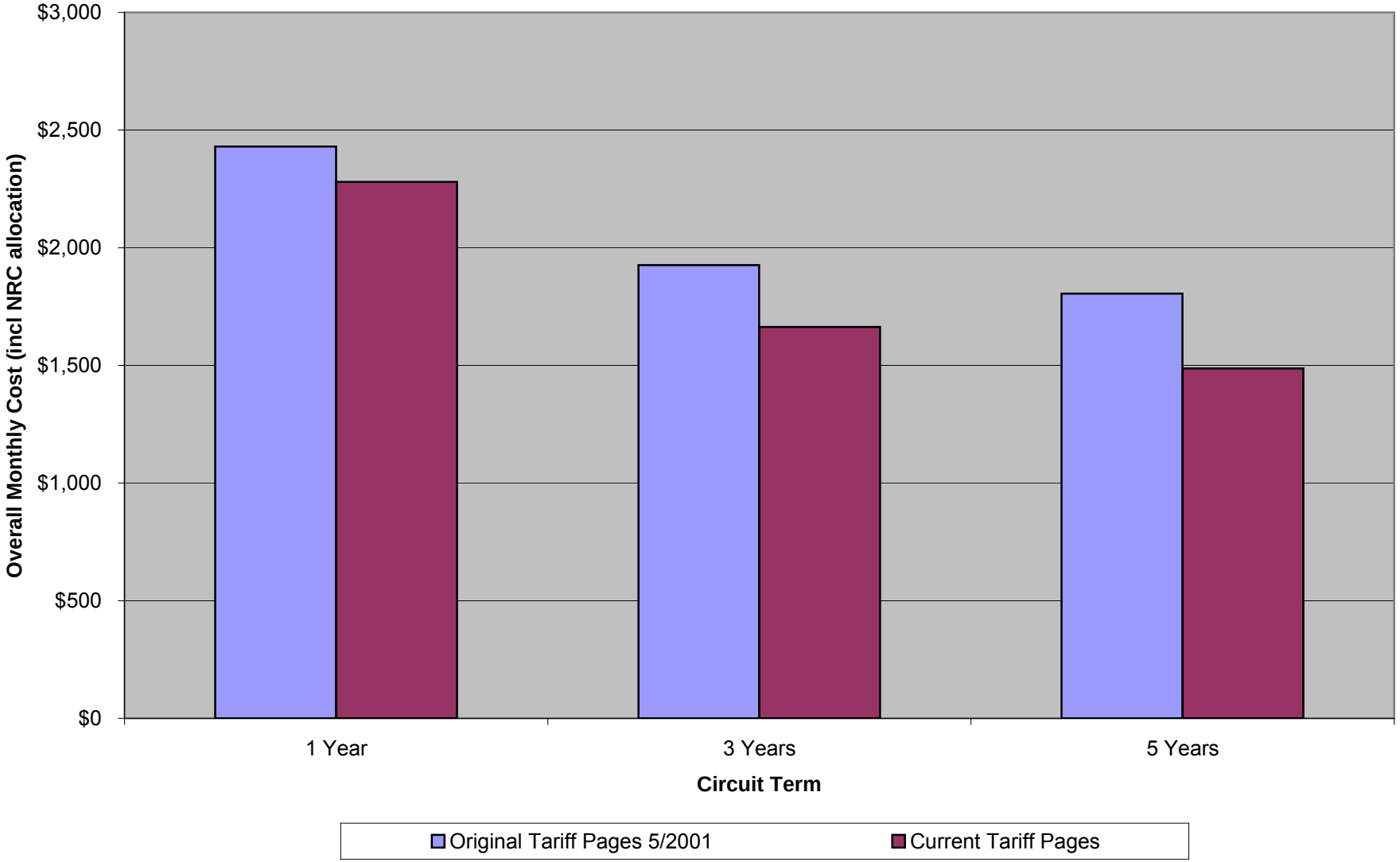

Time Series Comparison of DS1 Charges - Zone 1 - 5 Miles
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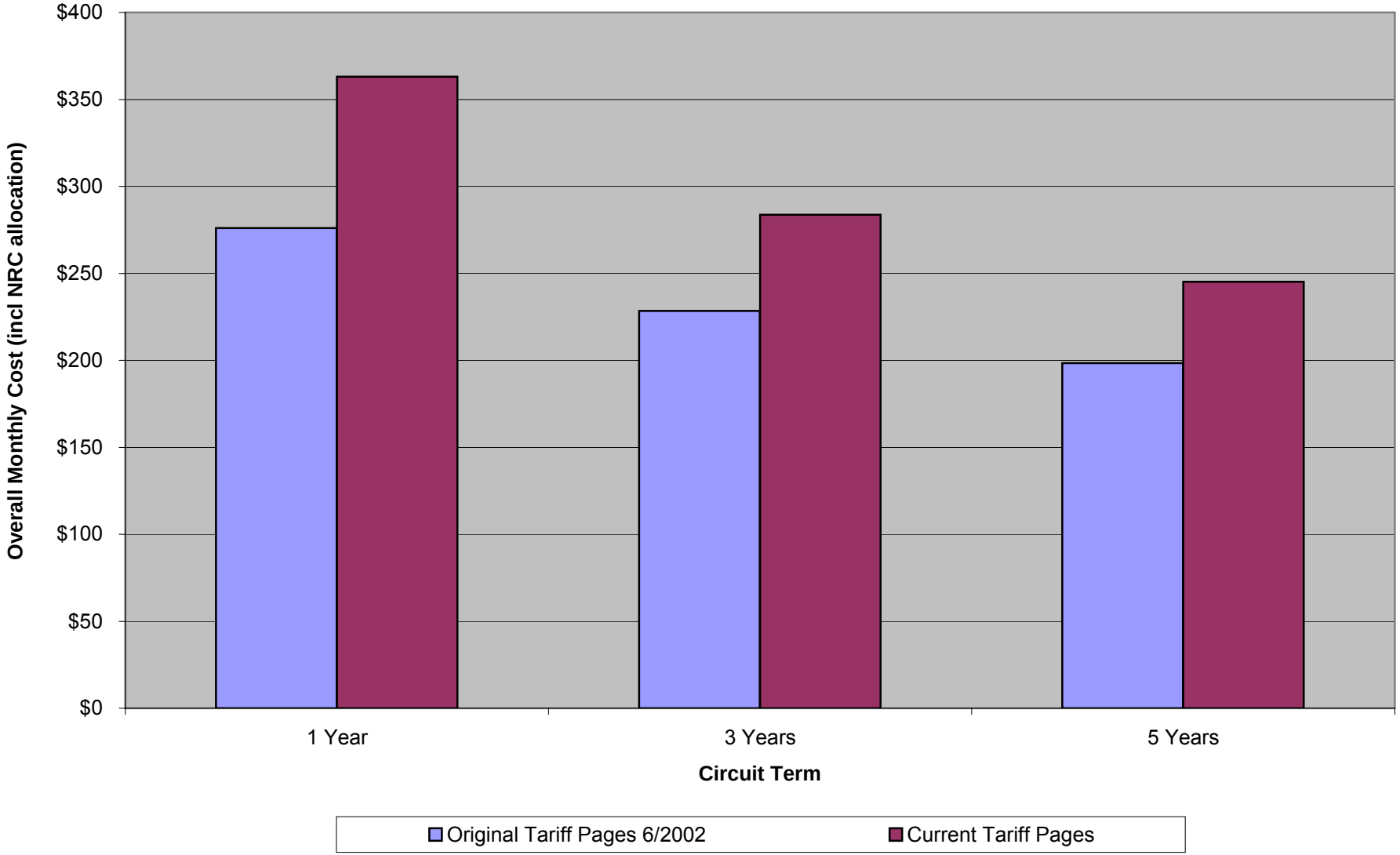

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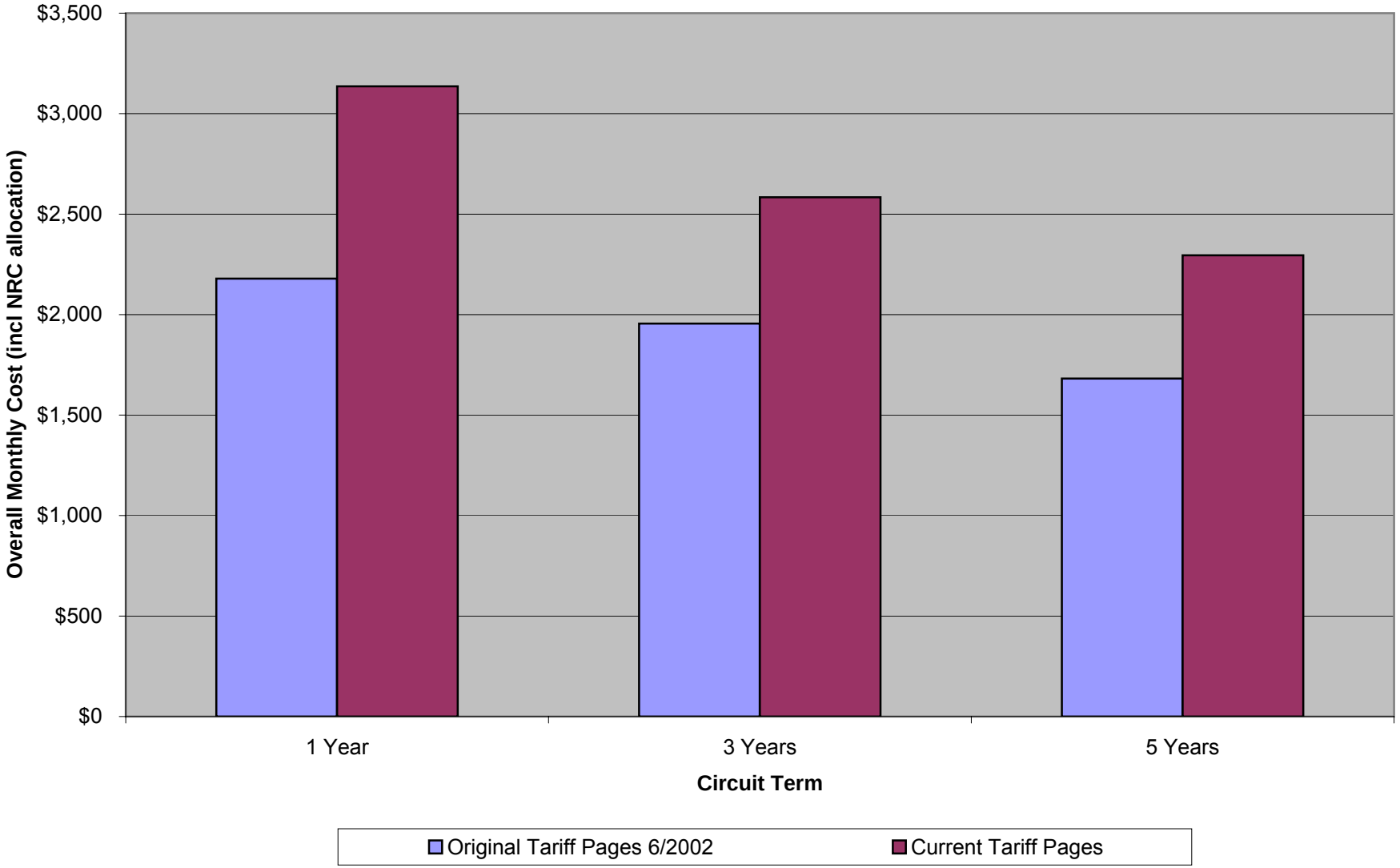

Time Series Comparison of DS1 Charges - TX Zone 1 - 5 Miles
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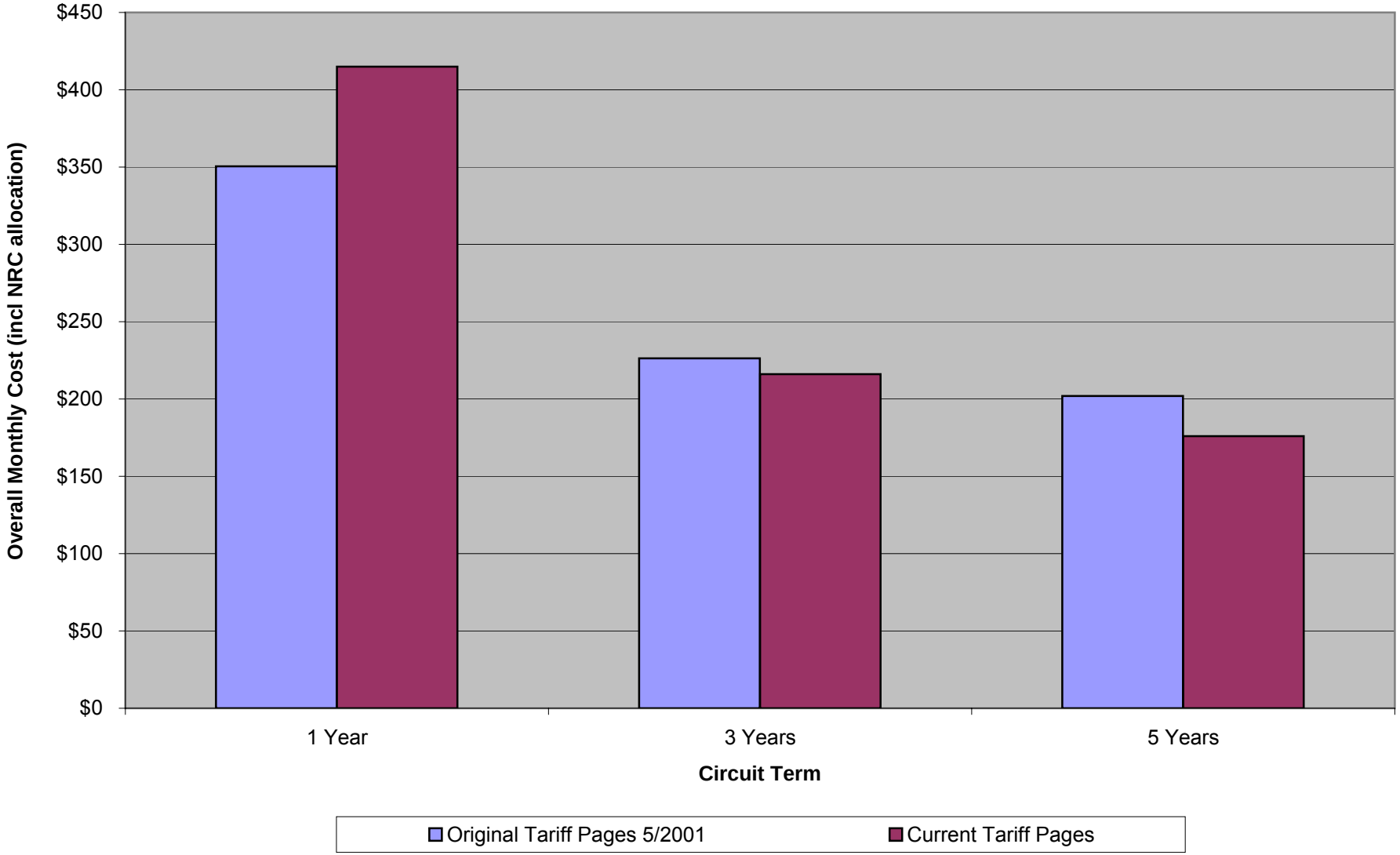

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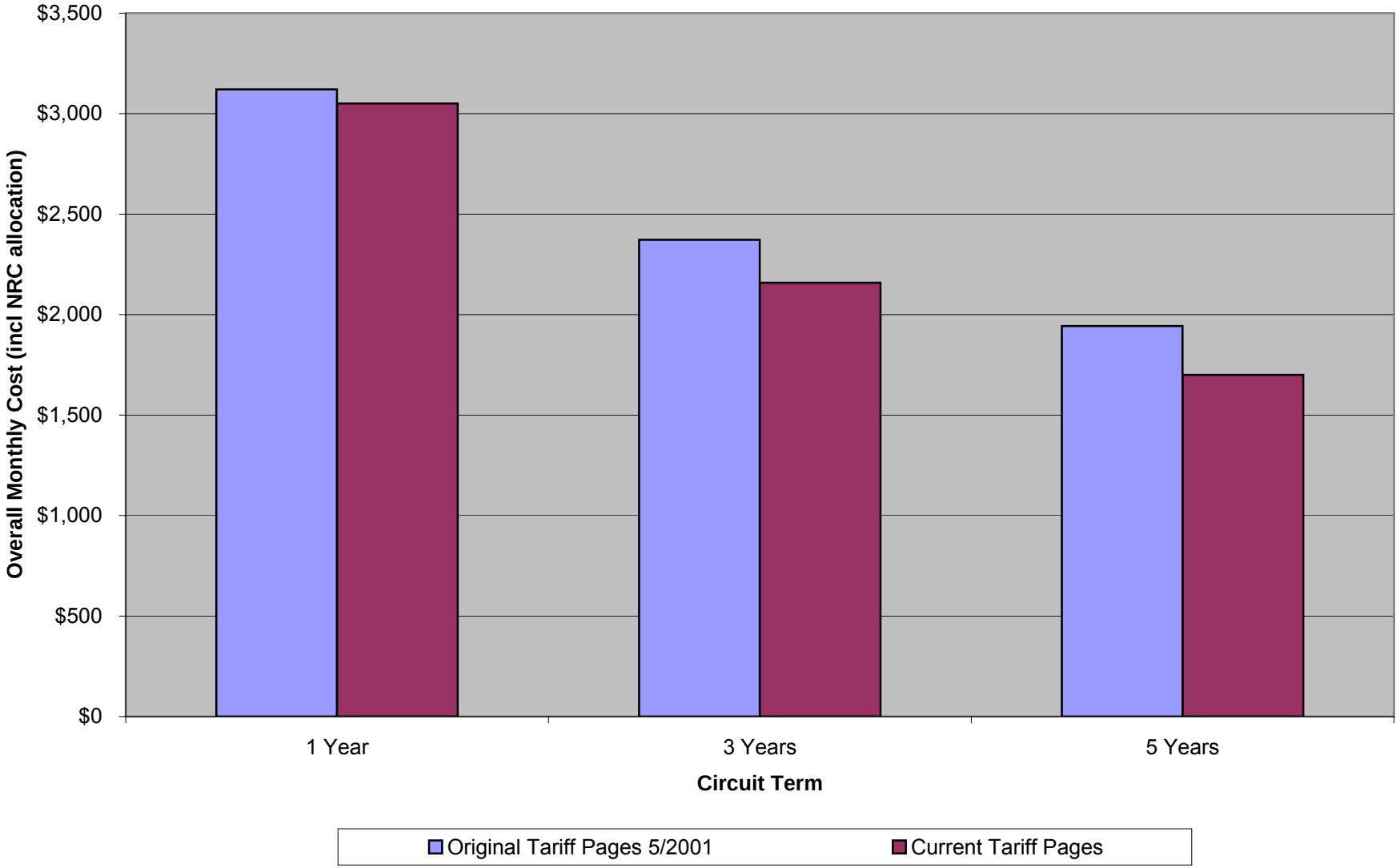

Time Series Comparison of DS1 Charges - Zone 1 - 5 Miles
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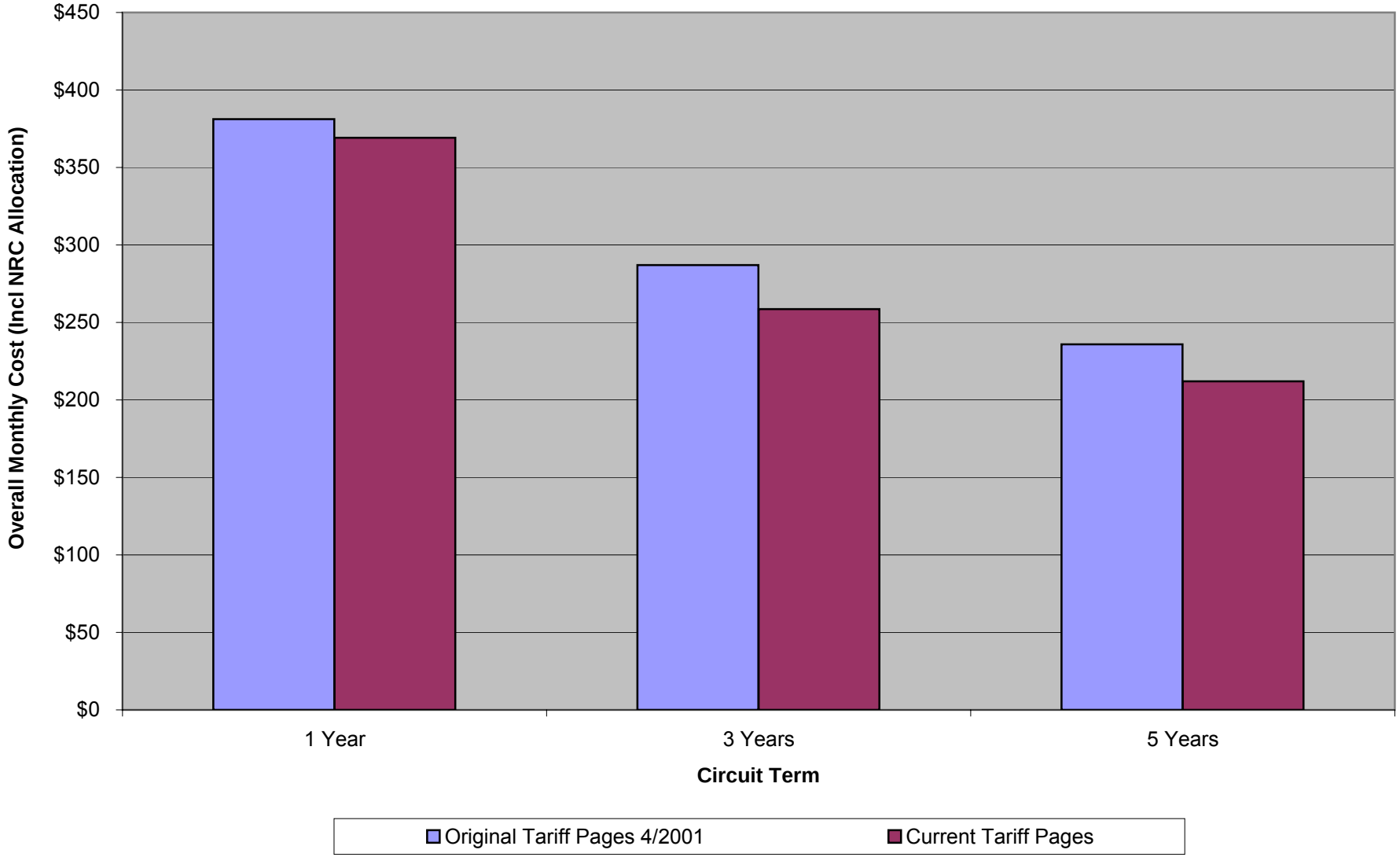

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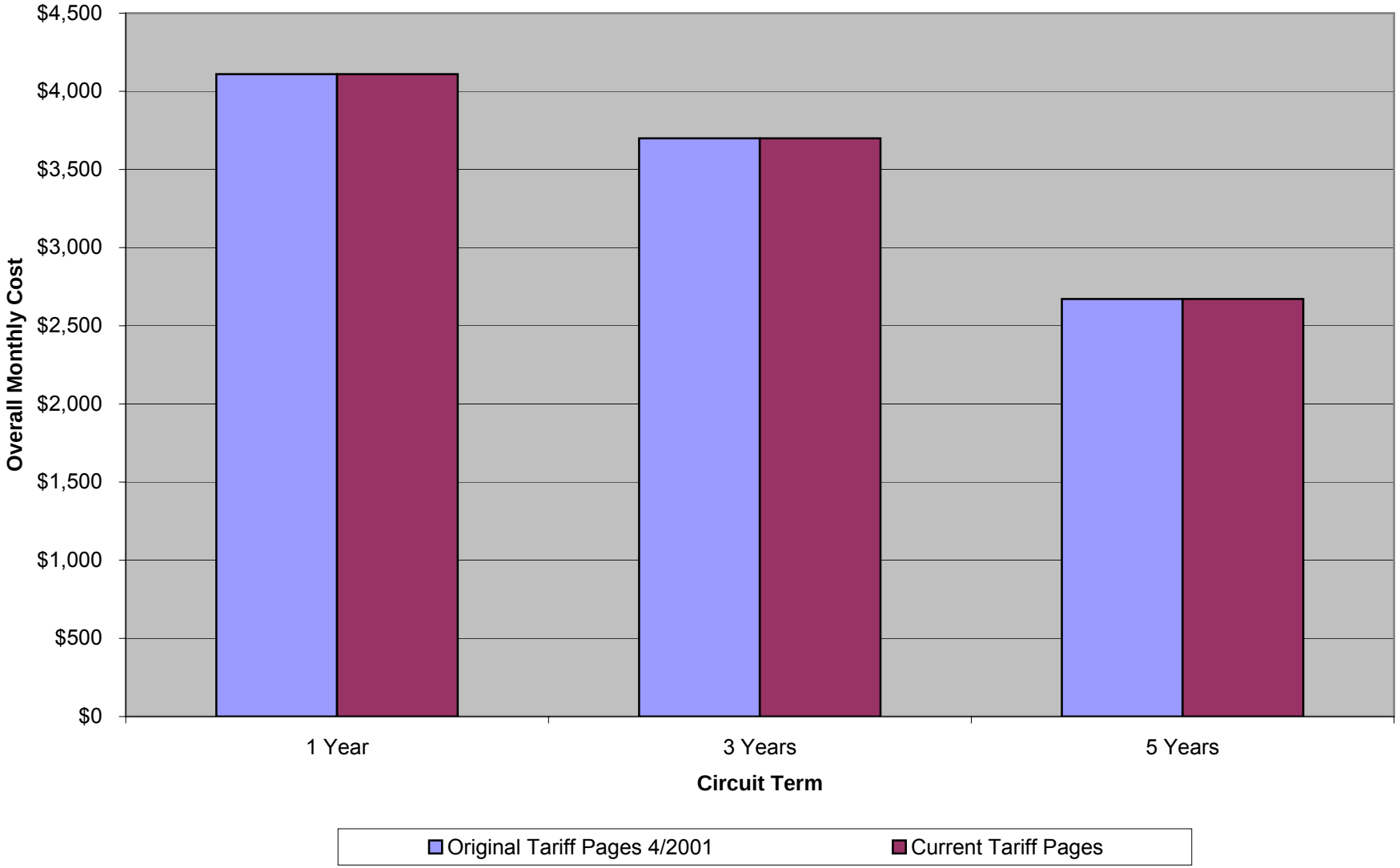

EXHIBIT 5

Time Series Comparison of DS1 Charges - IL Zone 2 - Channel Termination
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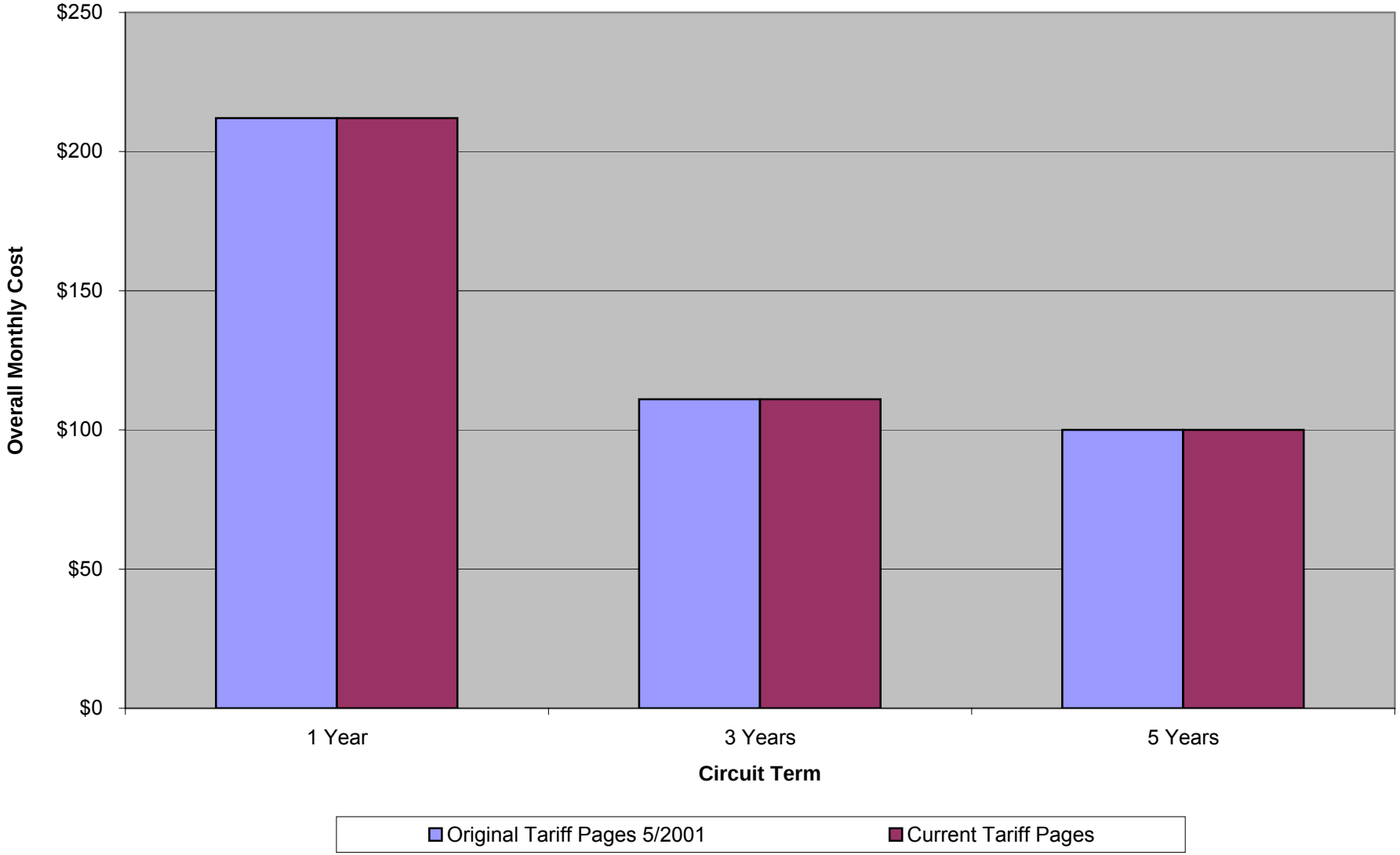

Time Series Comparison of DS3 Charges - IL Zone 2 - Channel Termination
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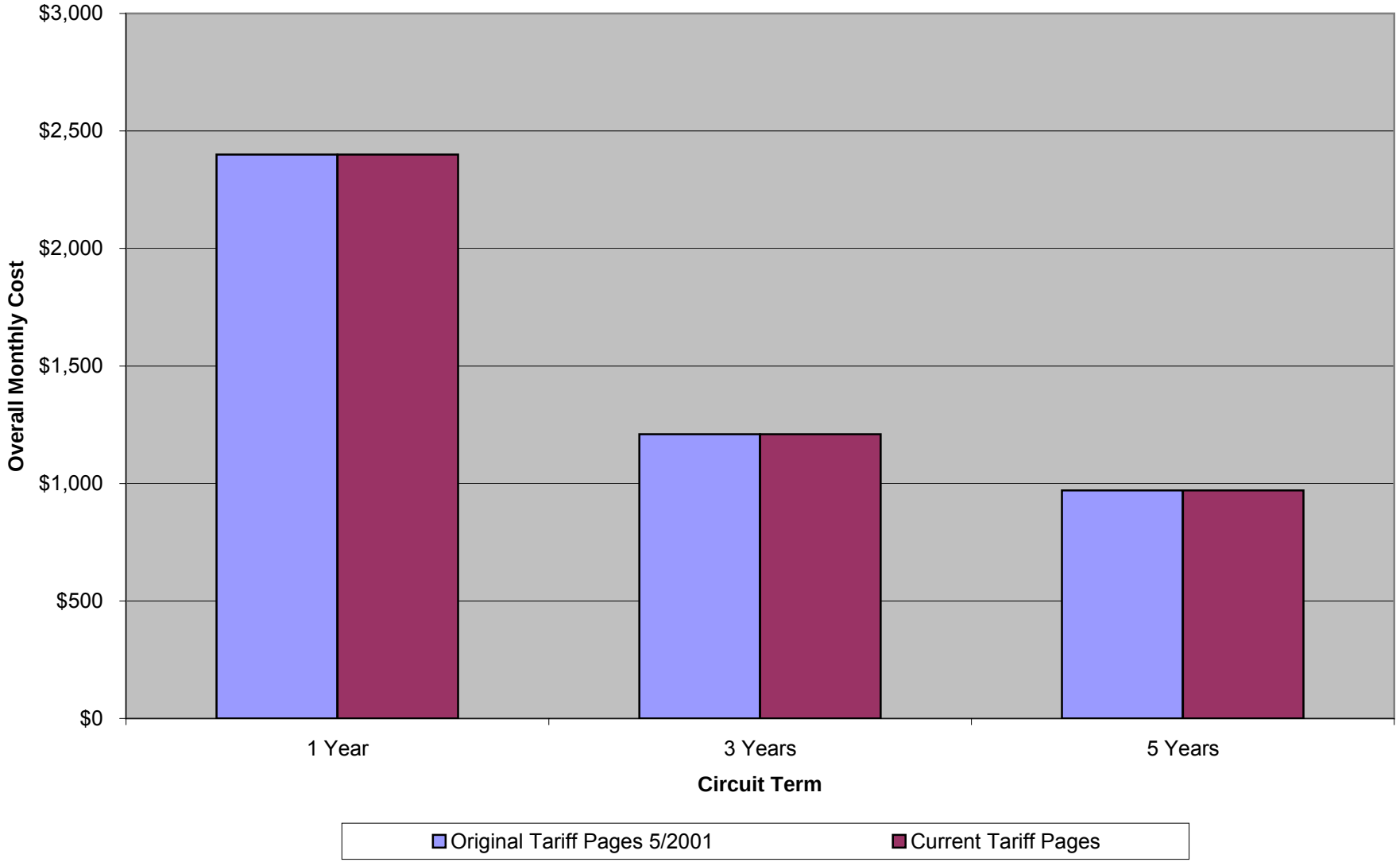
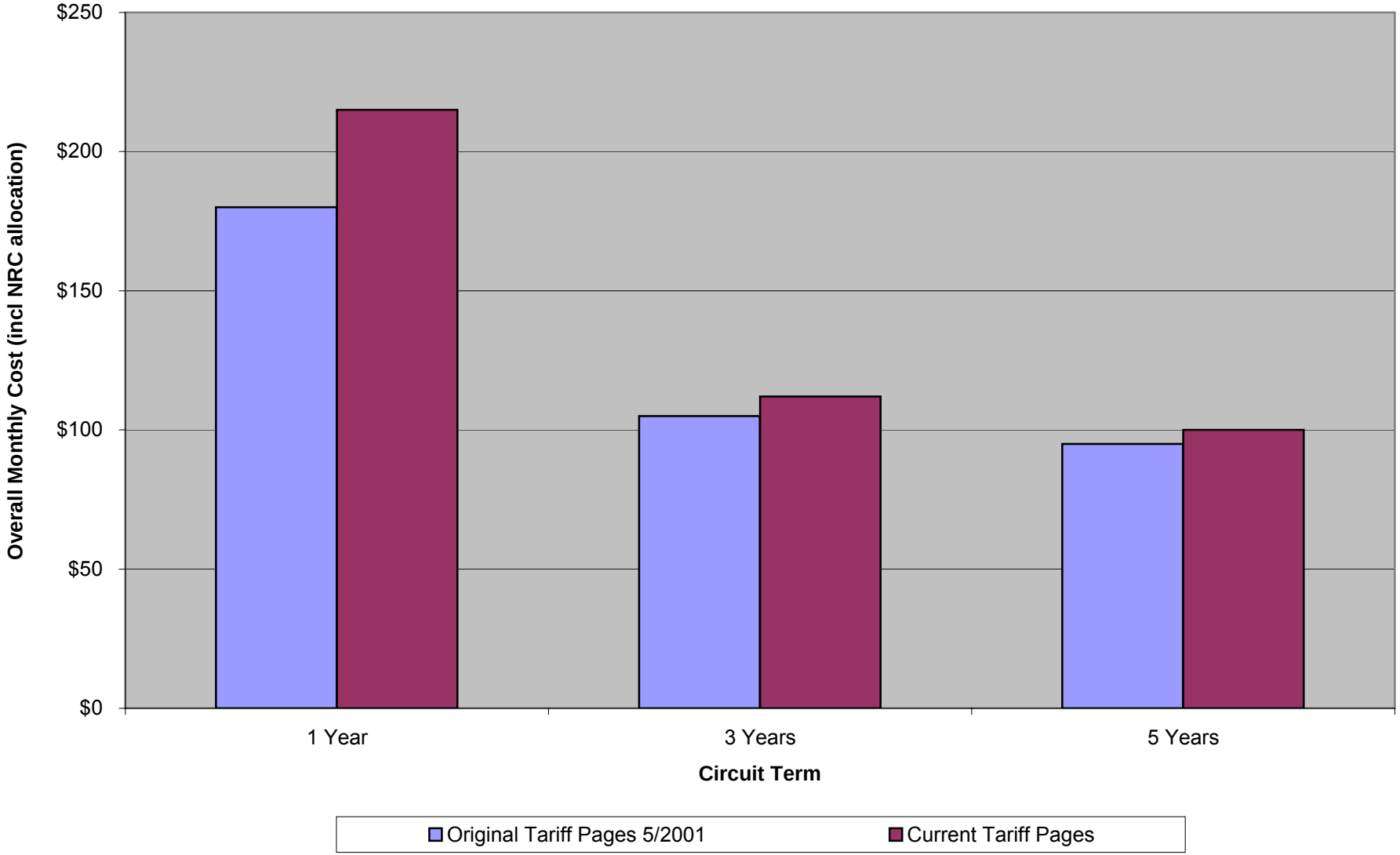


Time Series Comparison of DS1 Charges - Channel Termination
PacBell FCC 1



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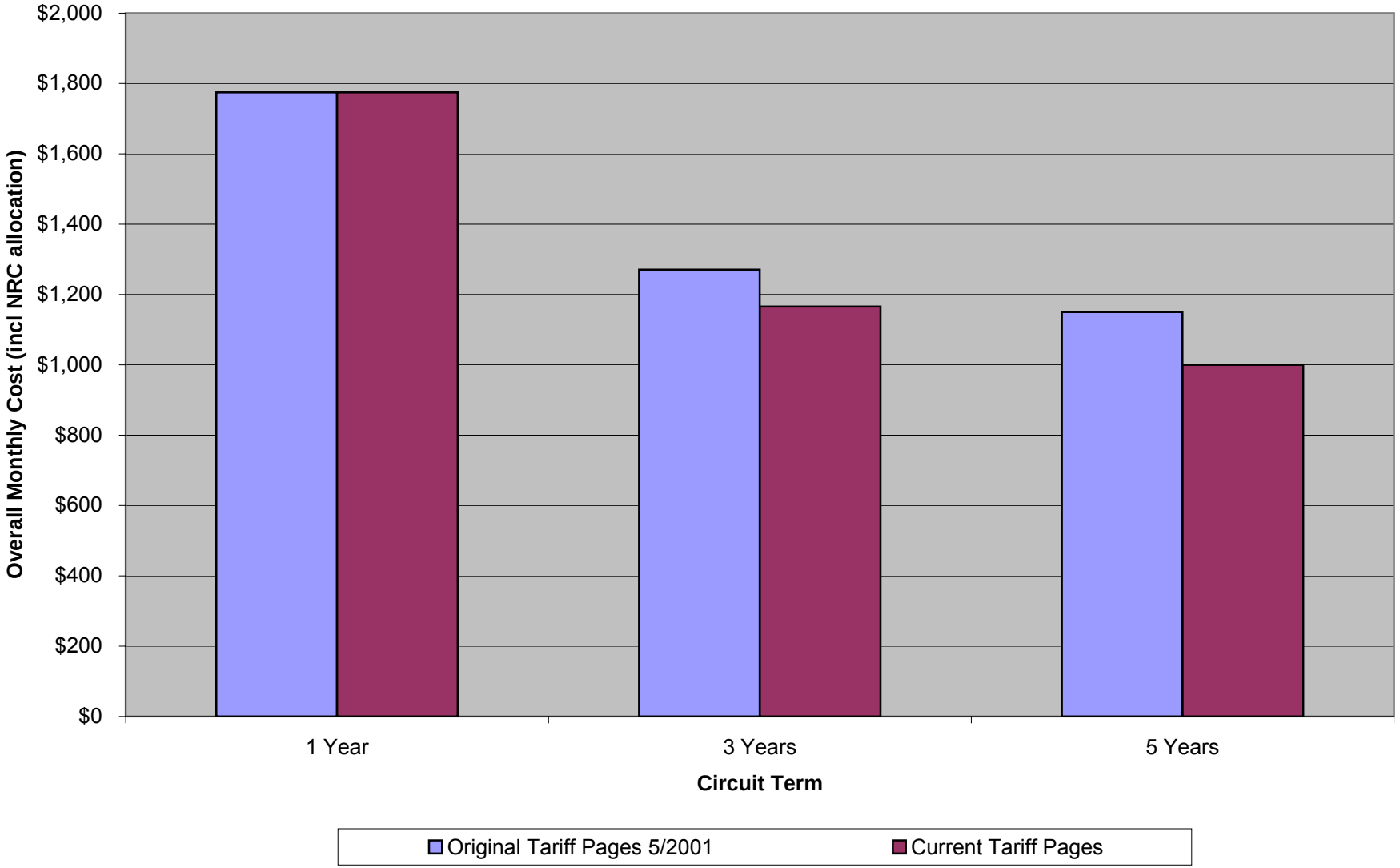
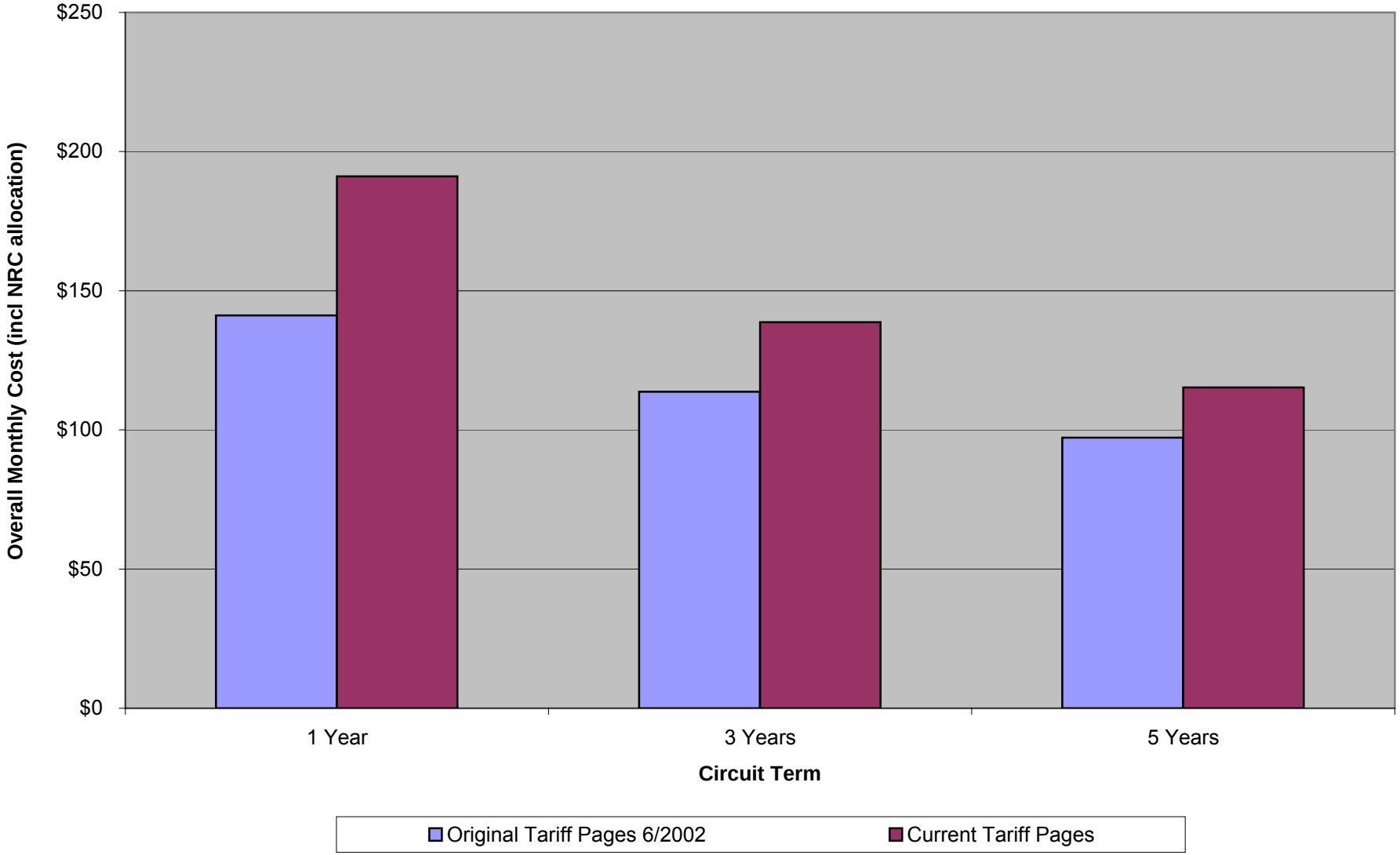
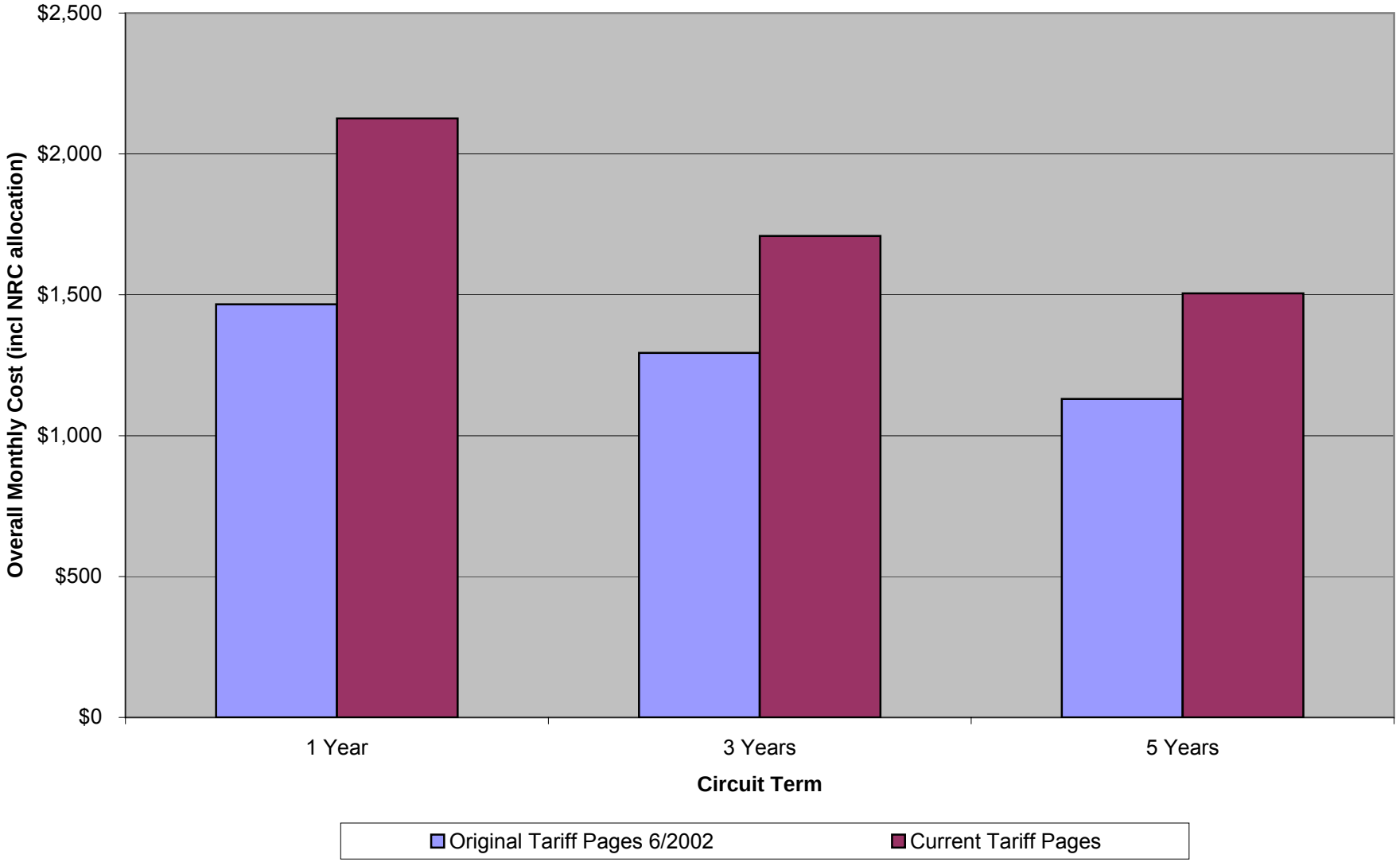
PacBell FCC 1



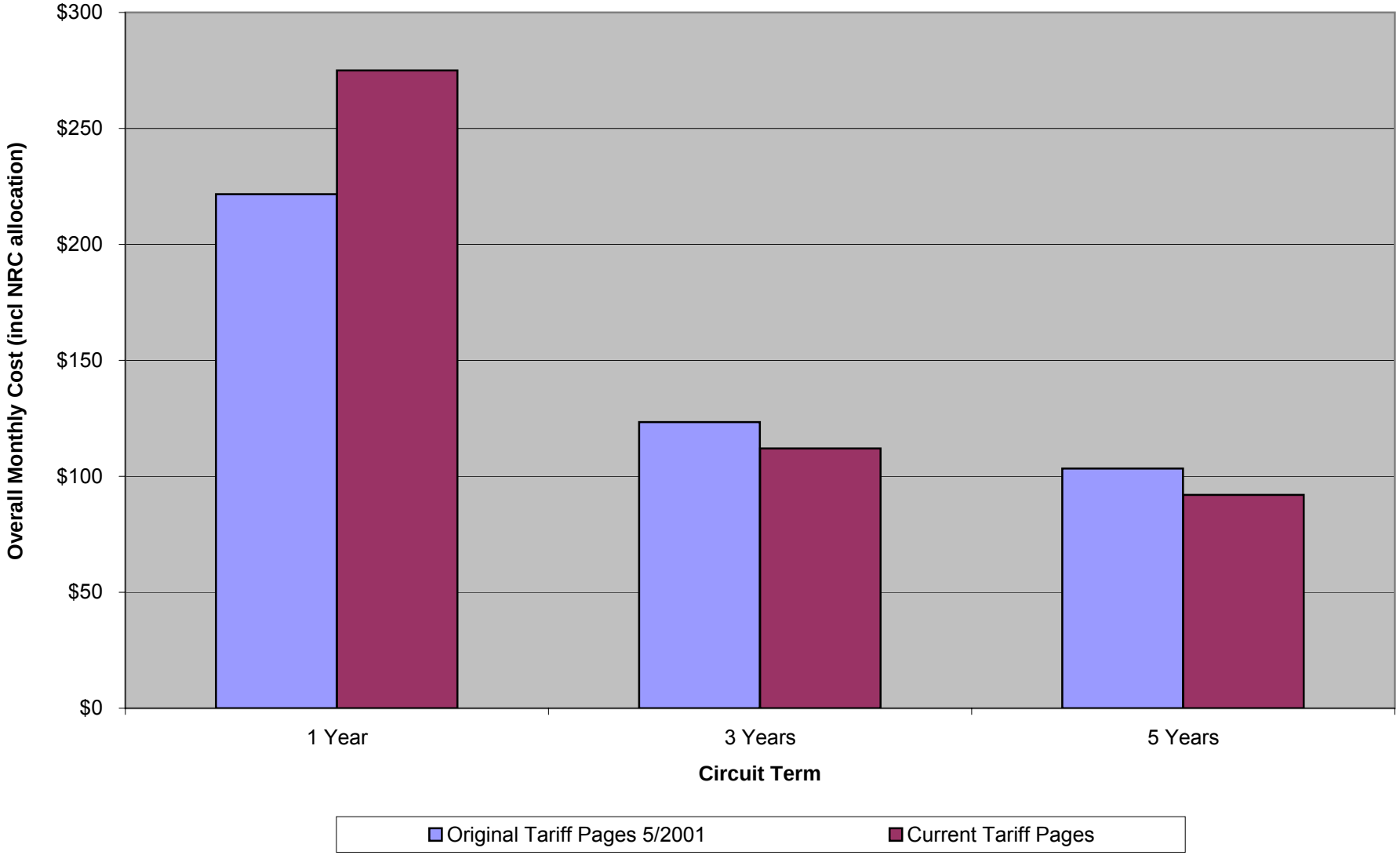
Time Series Comparison of DS1 Charges - Zone 1 - Channel Termination
Qwest FCC 1



Time Series Comparison of DS3 Charges - Zone 1 - Channel Termination
Qwest FCC 1



Time Series Comparison of DS1 Charges - TX Zone 1 - Channel Termination
SWBT FCC 73



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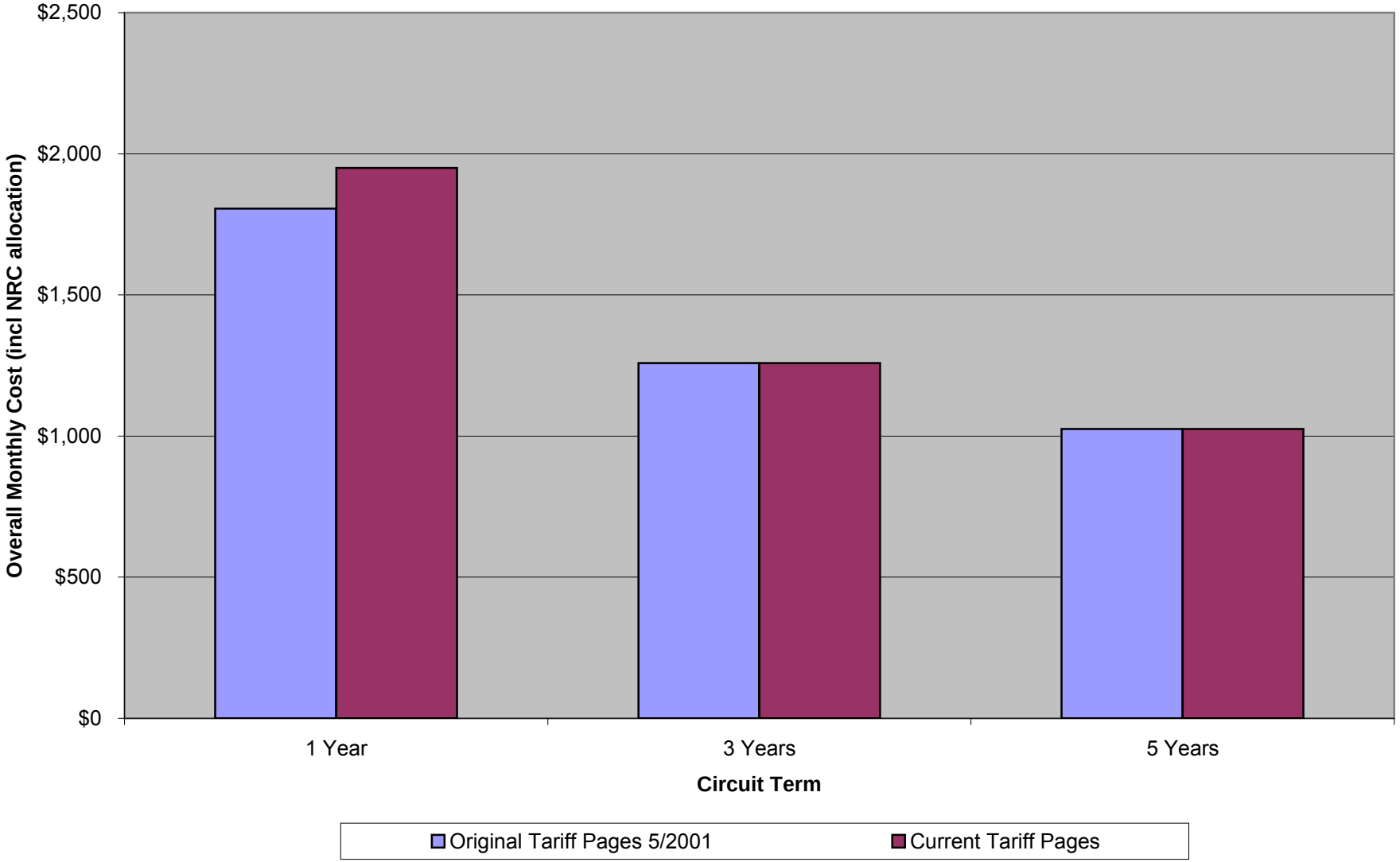


Time Series Comparison of DS1 Charges - Zone 1 - Channel Termination
Verizon (South) FCC 1

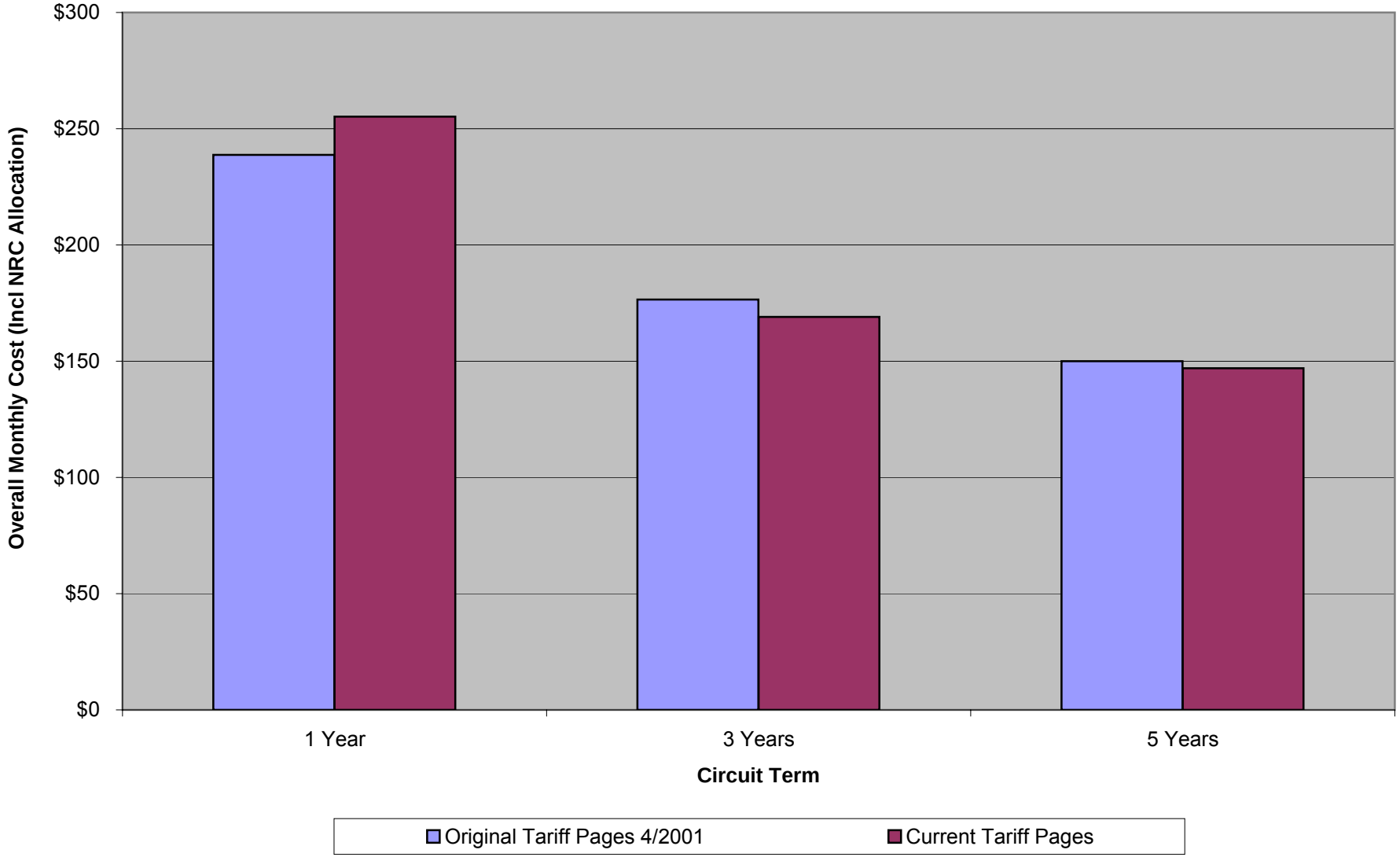
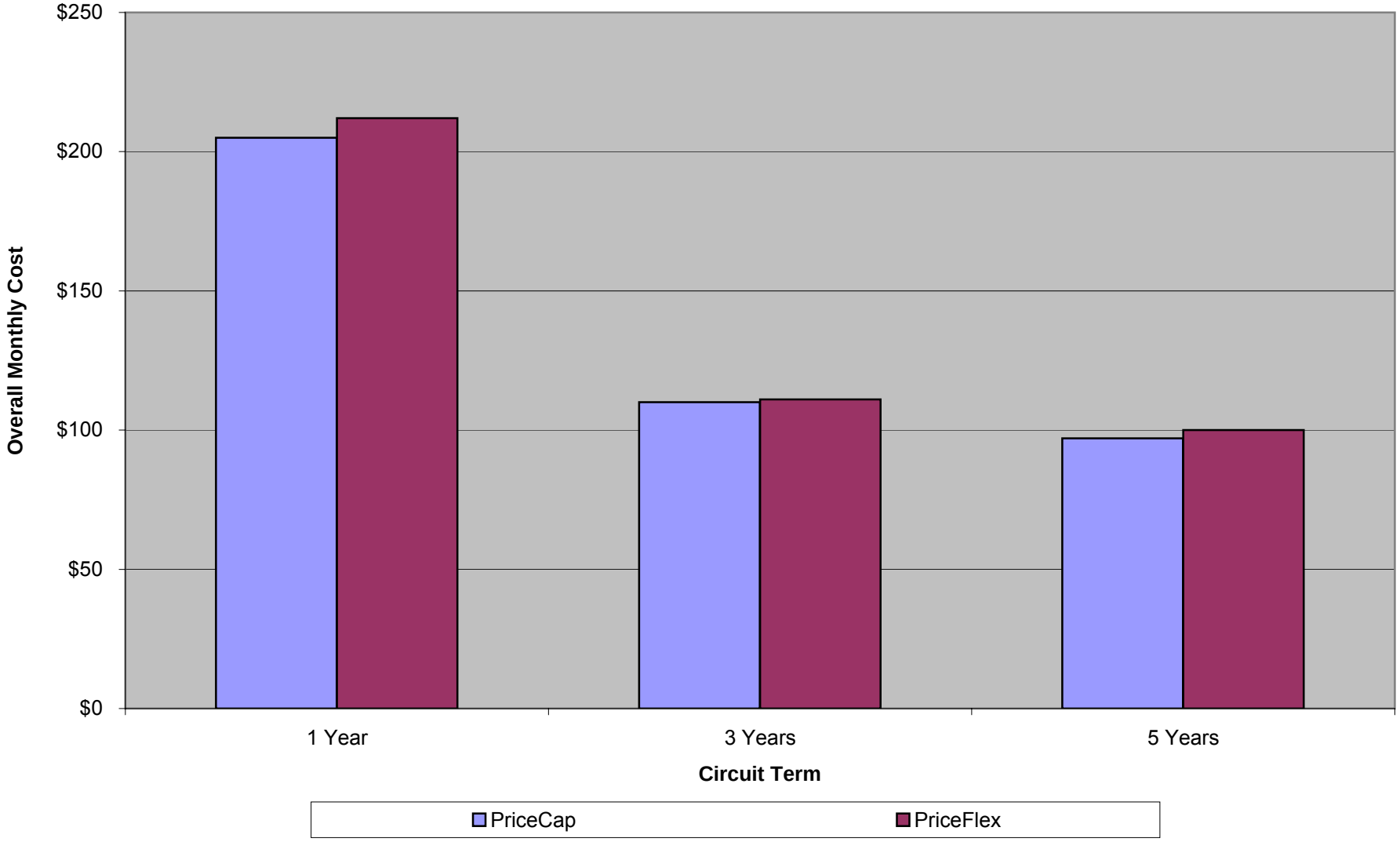


EXHIBIT 6

PriceFlex v. PriceCap Comparison of DS1 Charges - IL Zone 2 - Channel Termination
Ameritech FCC 2



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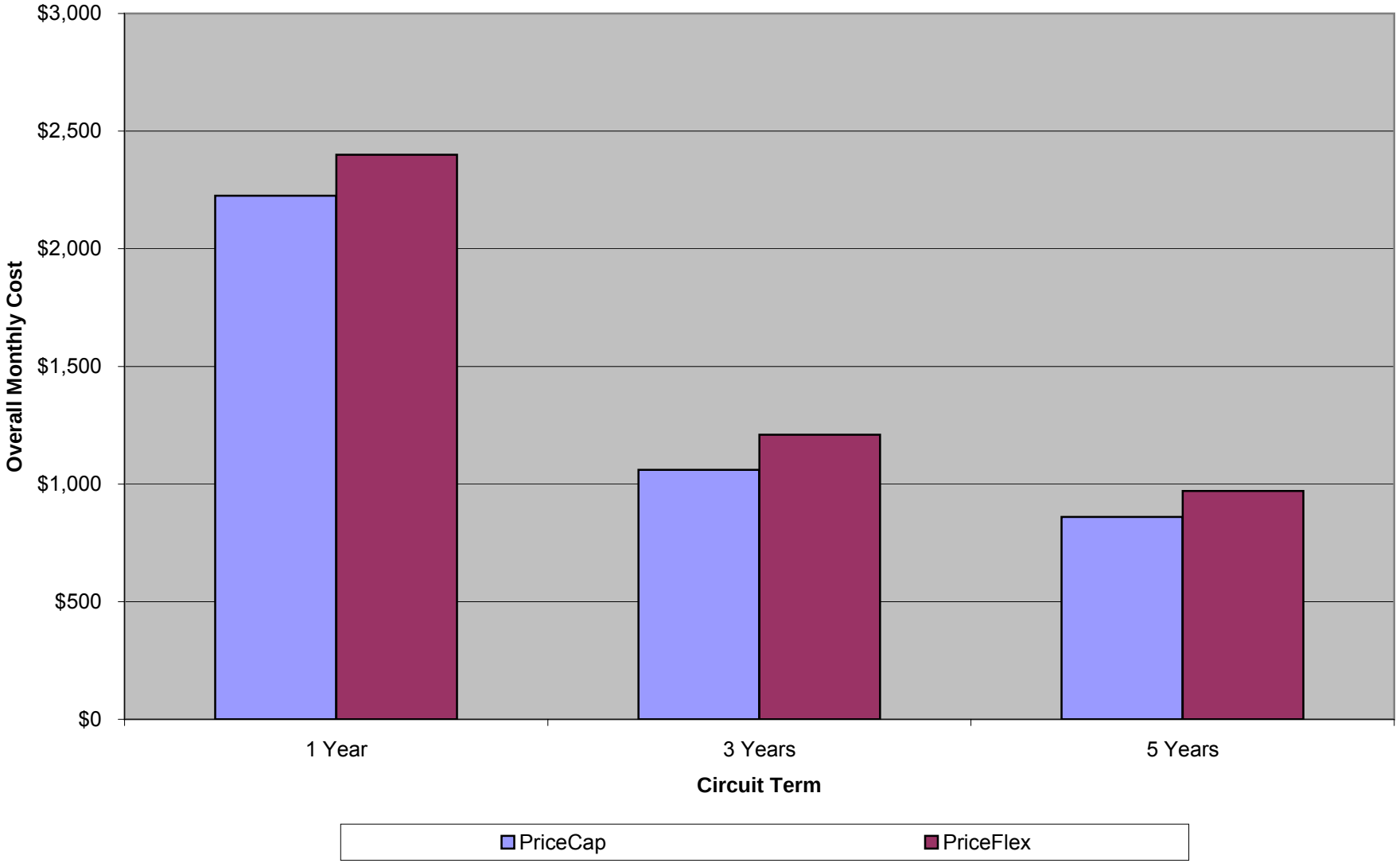
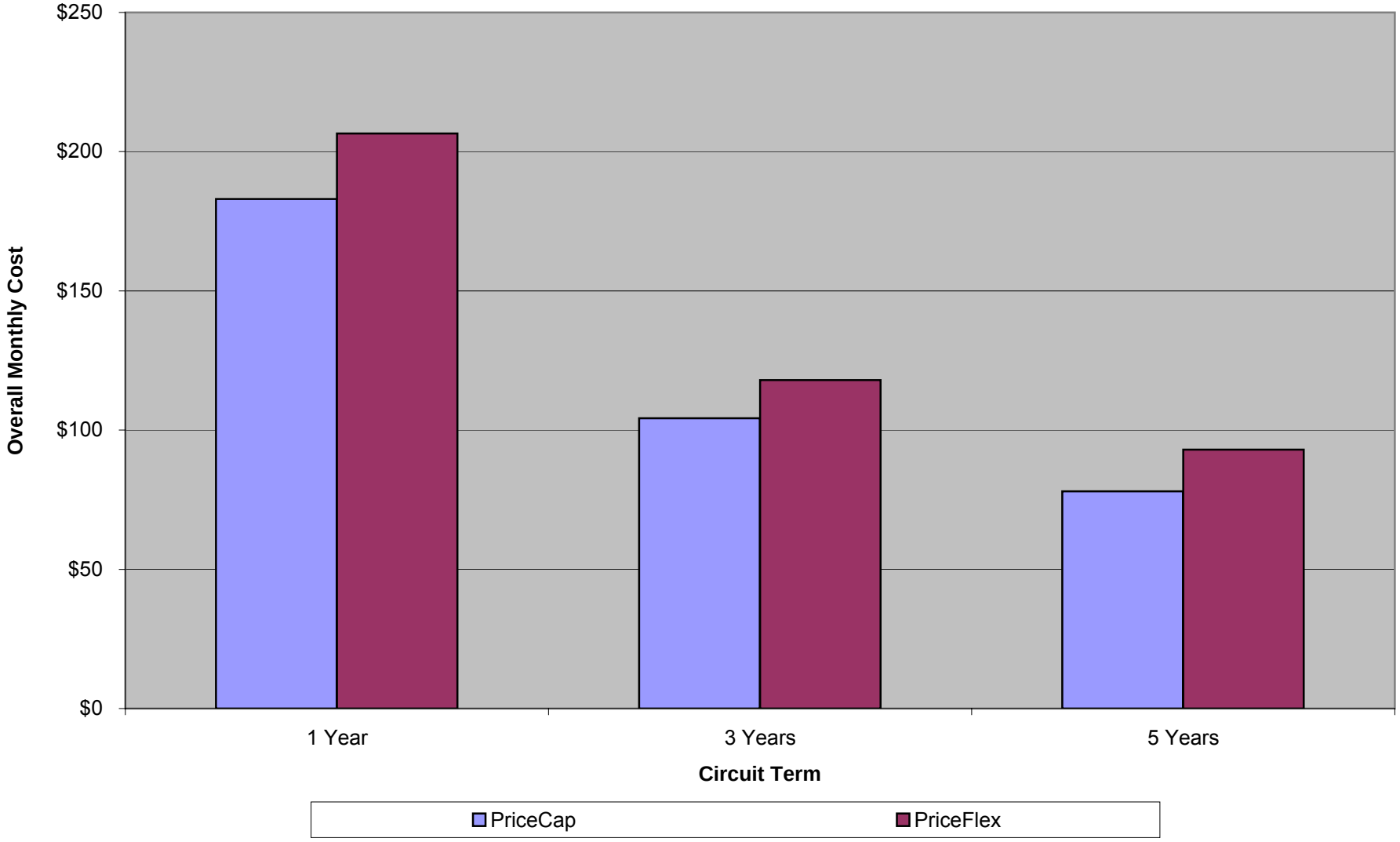


PriceFlex v. PriceCap Comparison of DS1 Charges - IL Zone 2 - Interoffice5Miles
Ameritech FCC 2



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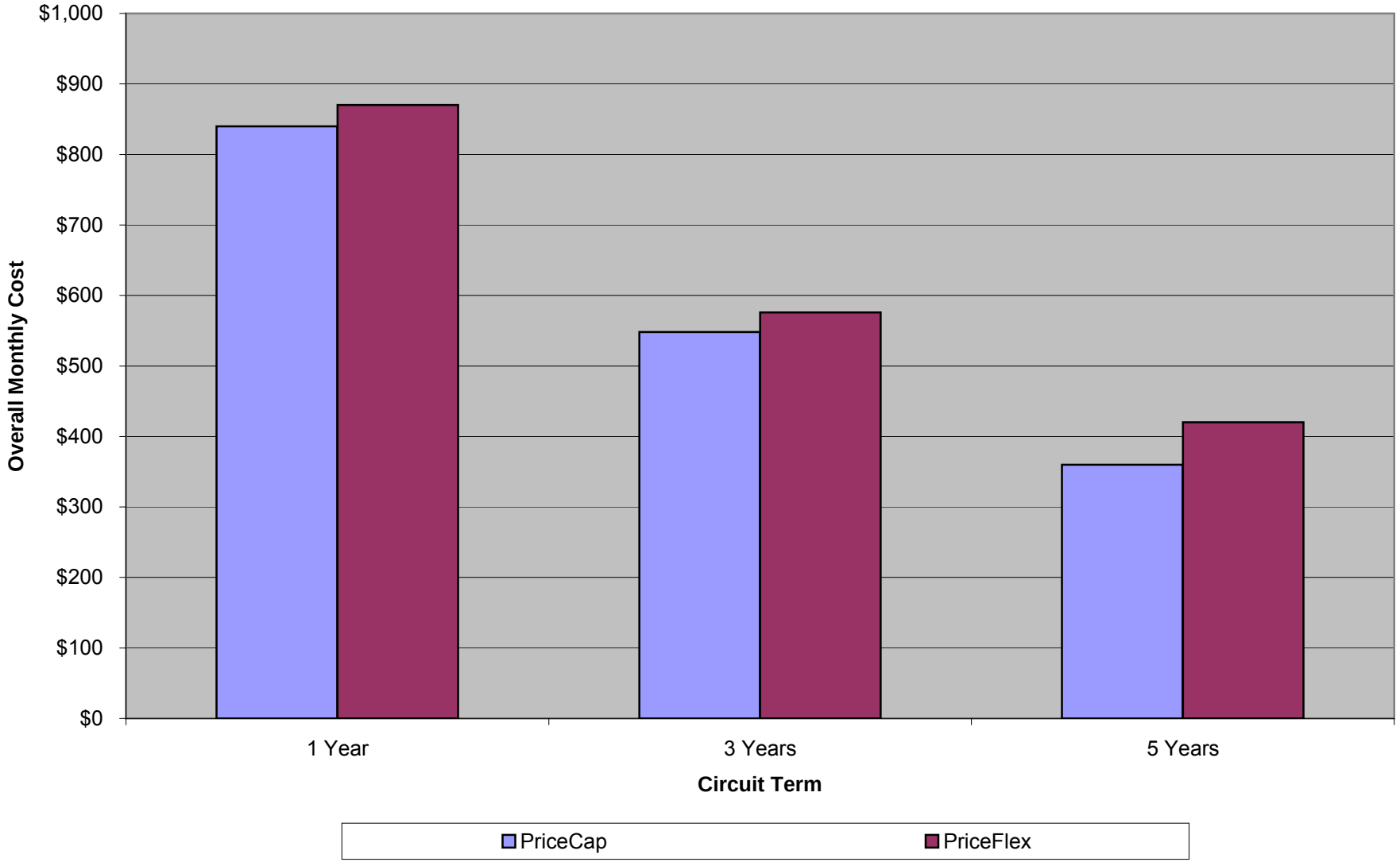
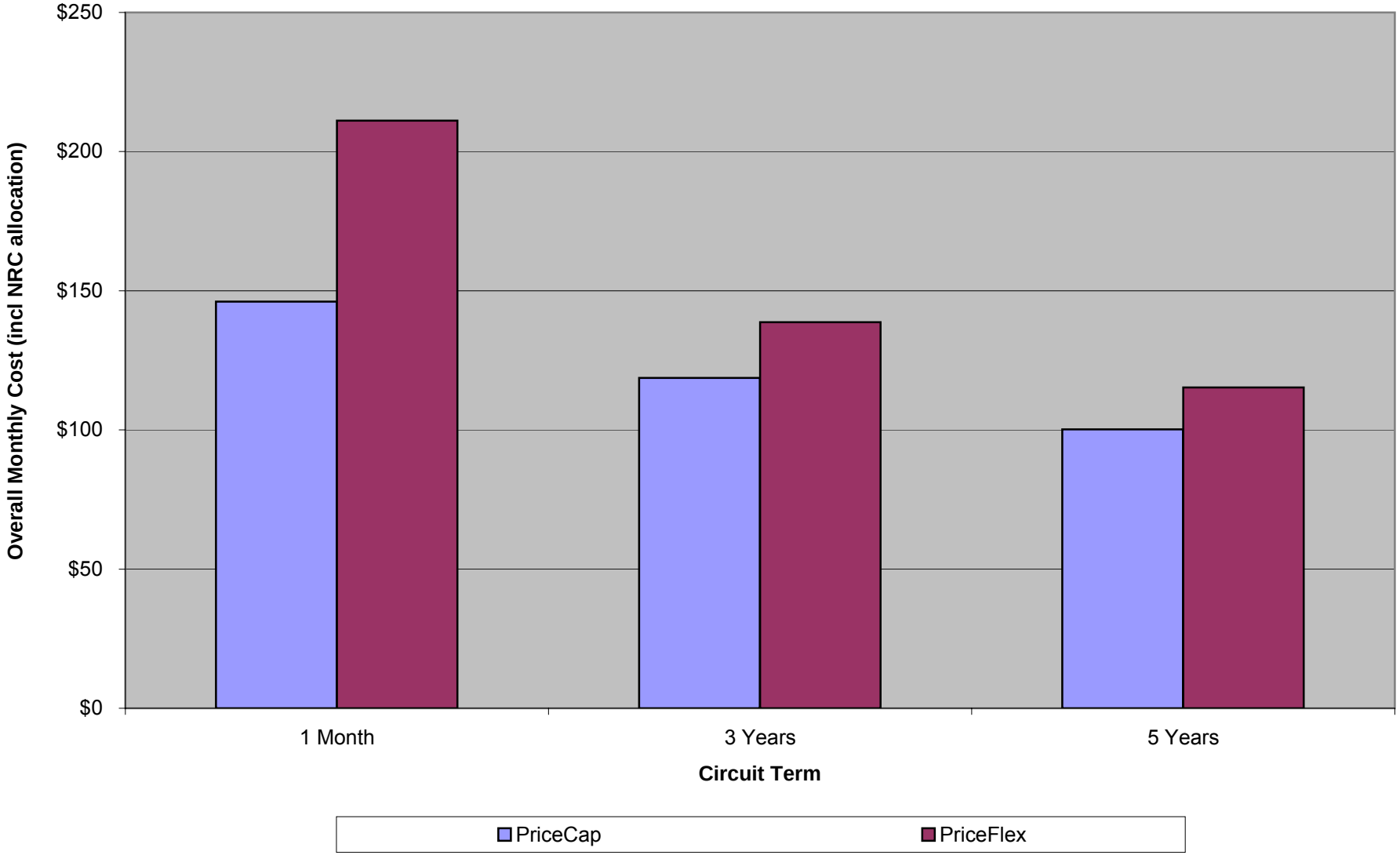


PriceFlex v. PriceCap Comparison of DS1 Charges - Zone 1 - Channel Termination
Qwest FCC 1



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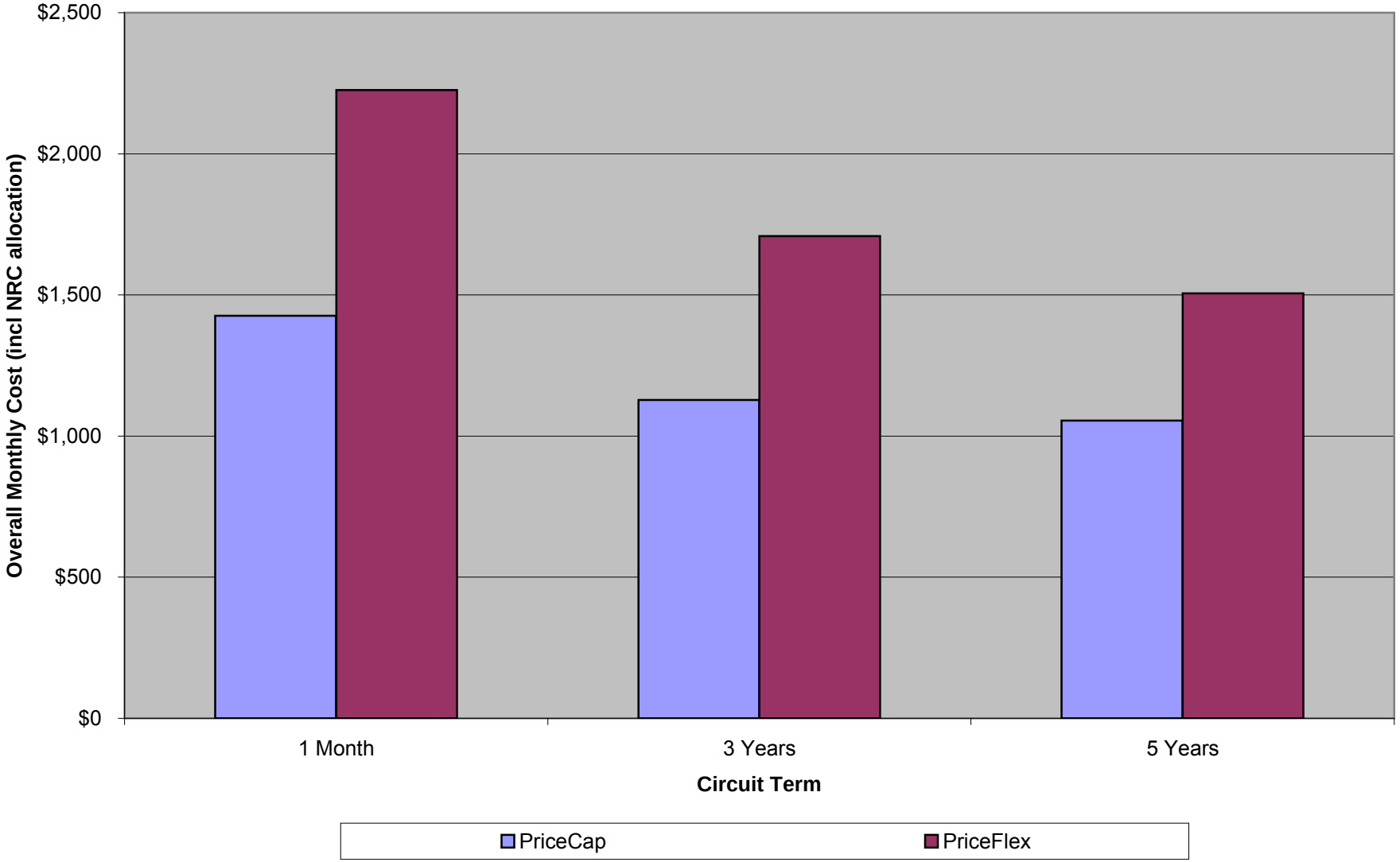

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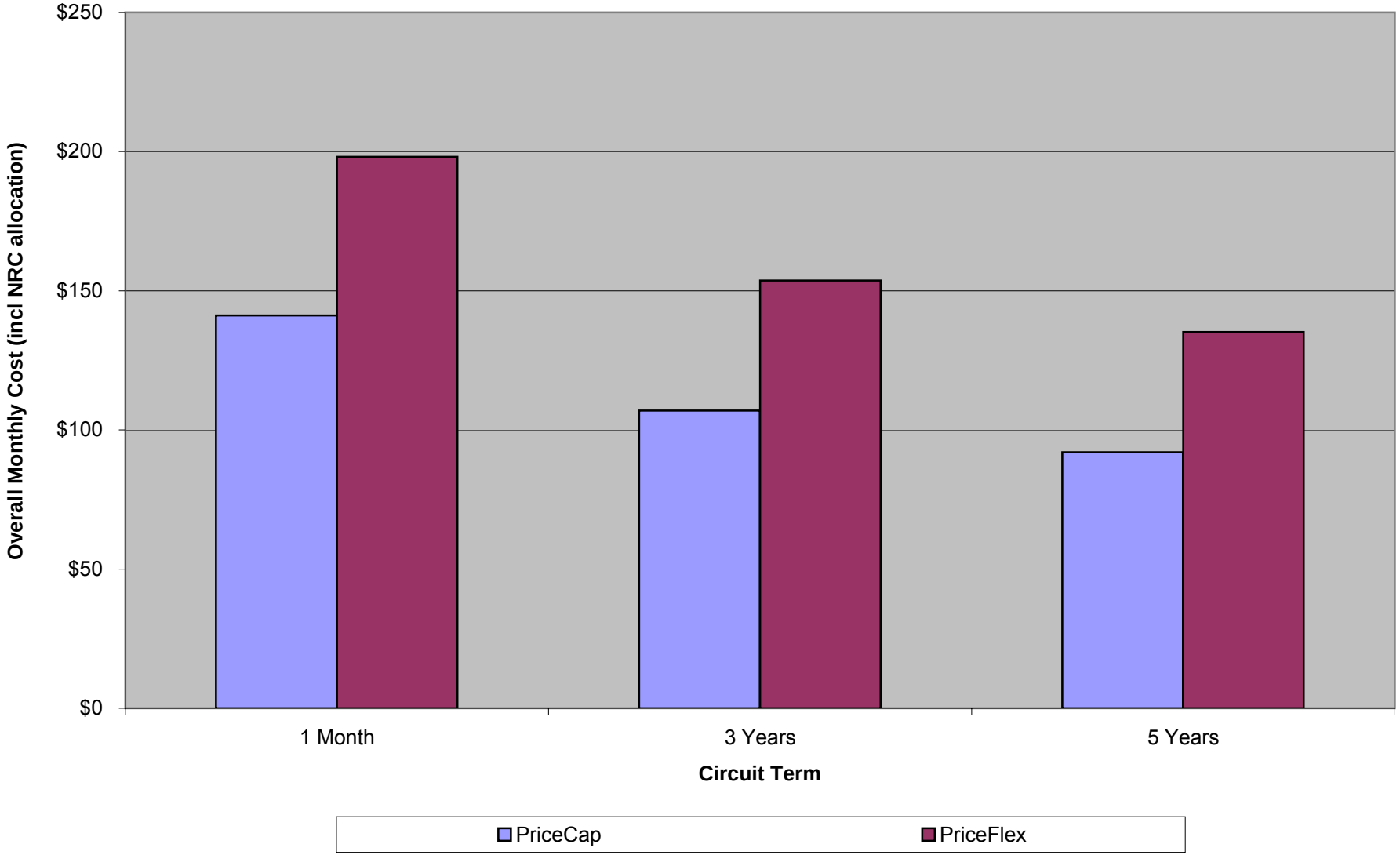

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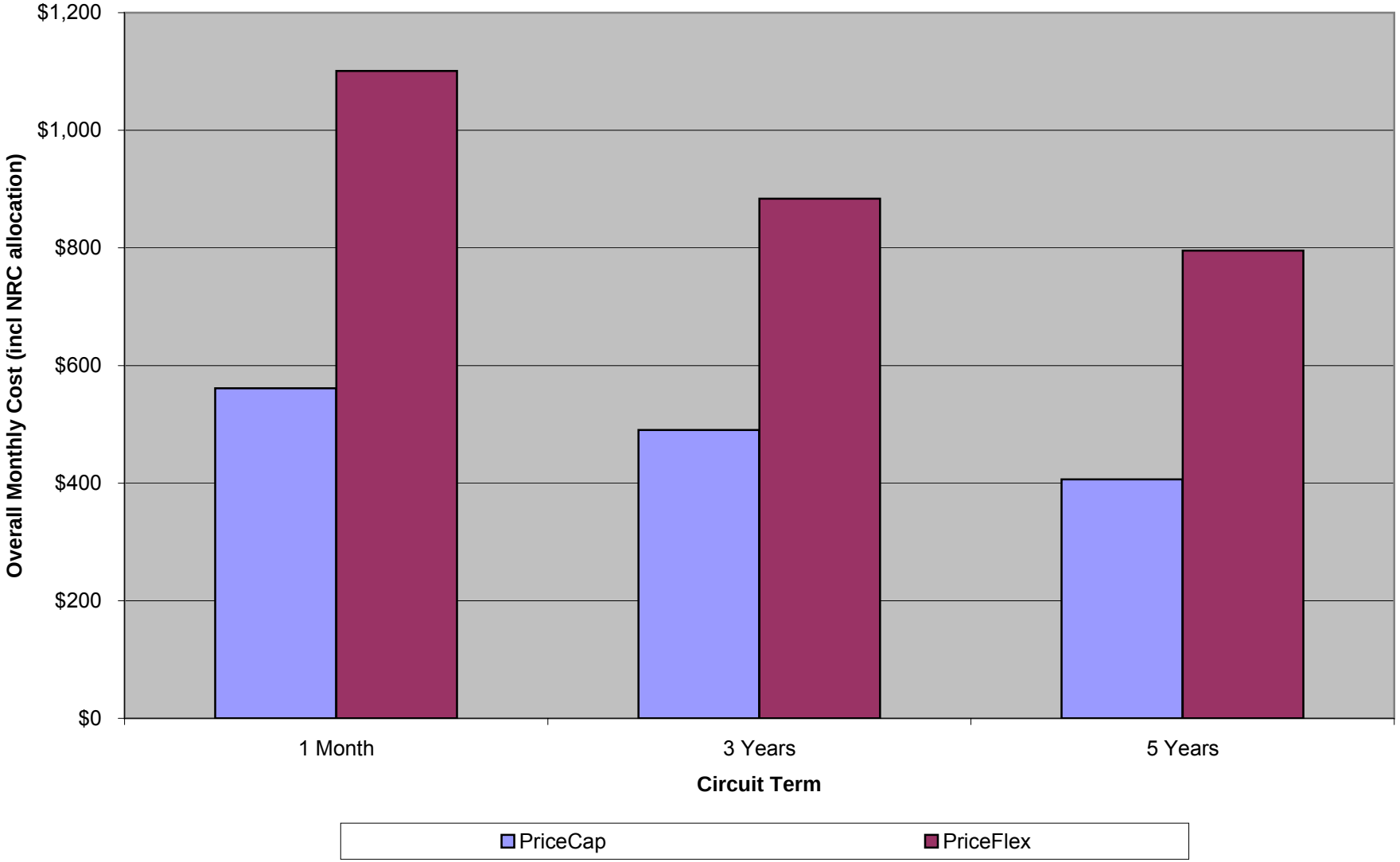
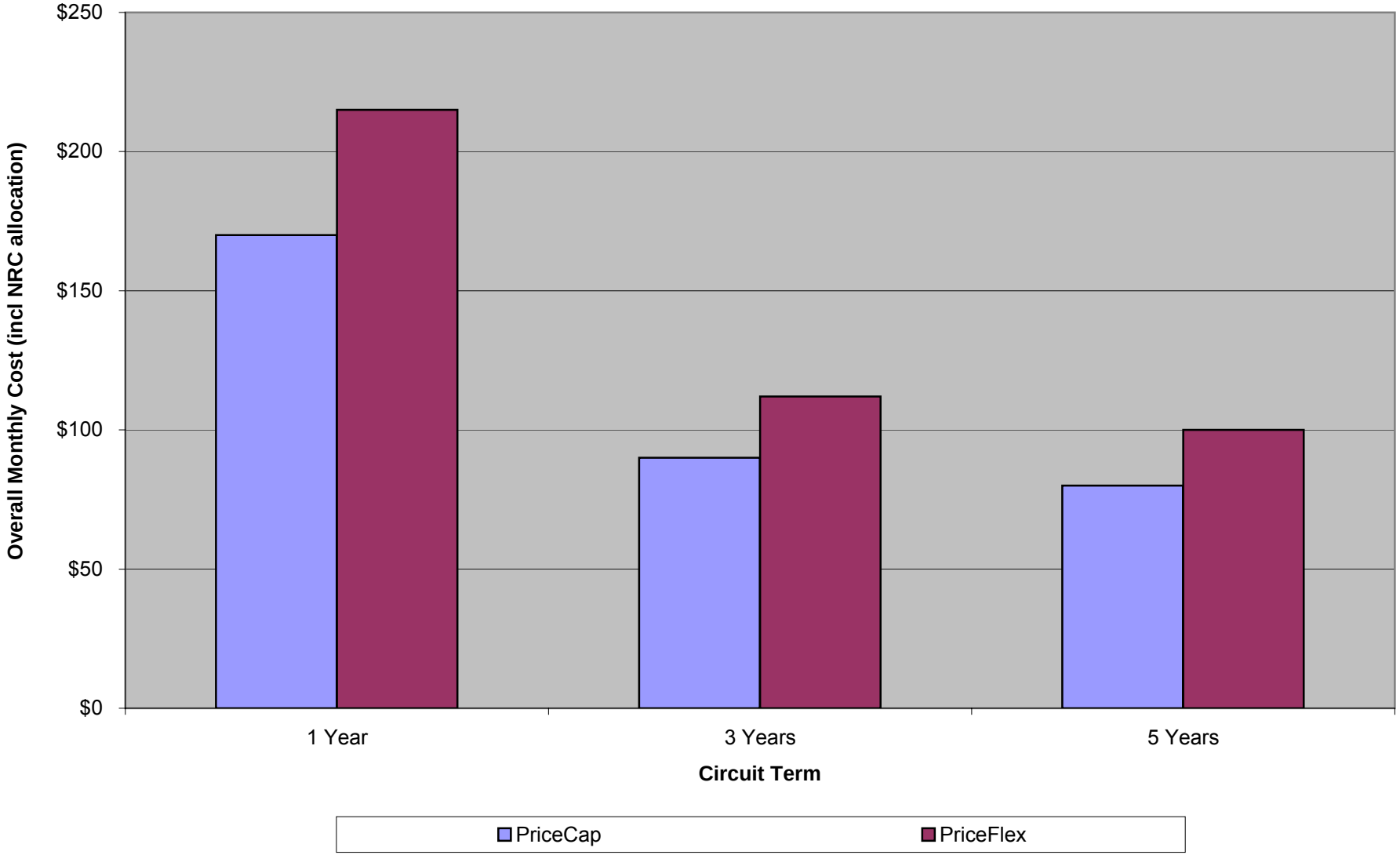


PriceFlex v. PriceCap Comparison of DS1 Charges - Channel Termination
PacBell FCC 1



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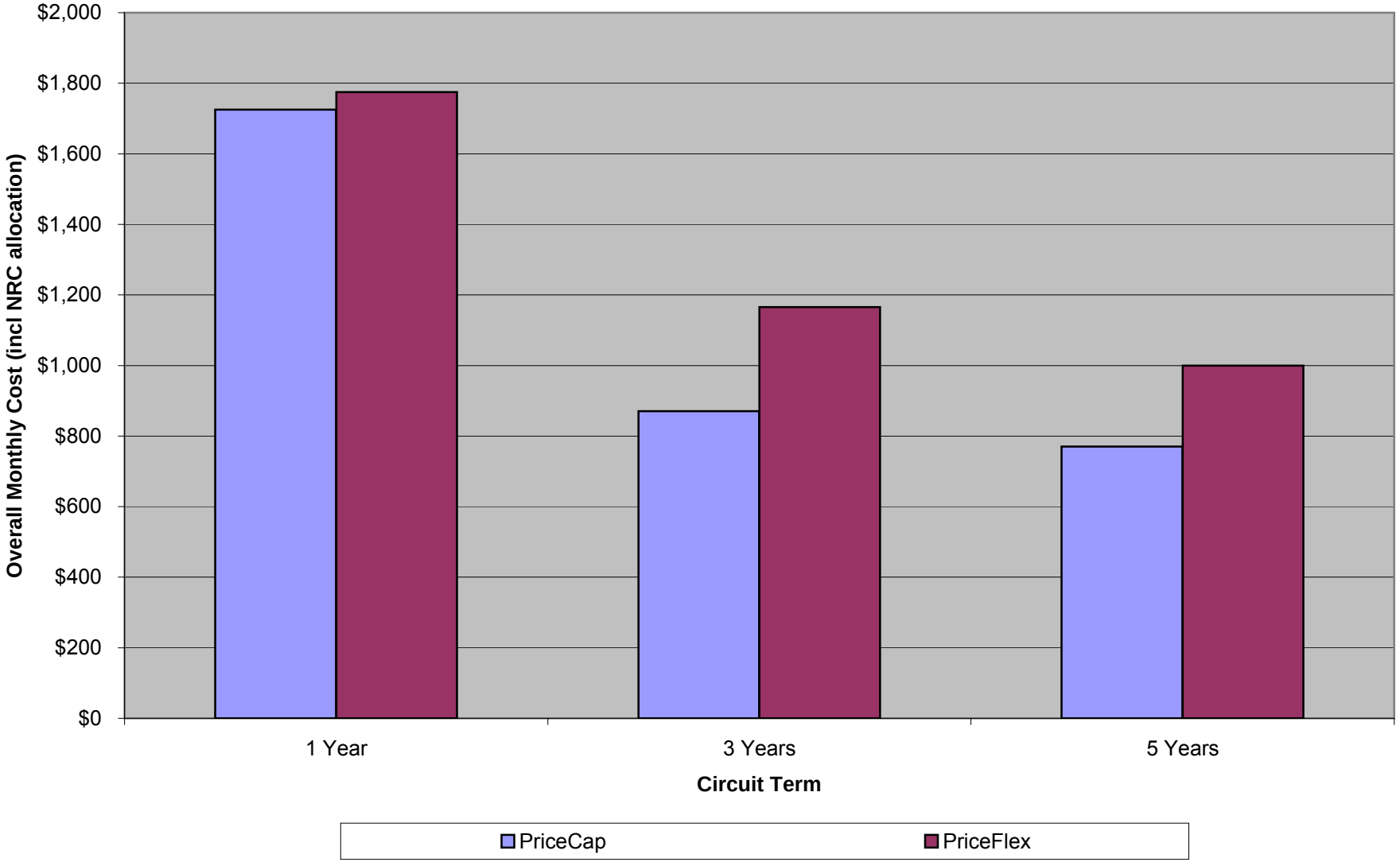
PacBell FCC 1



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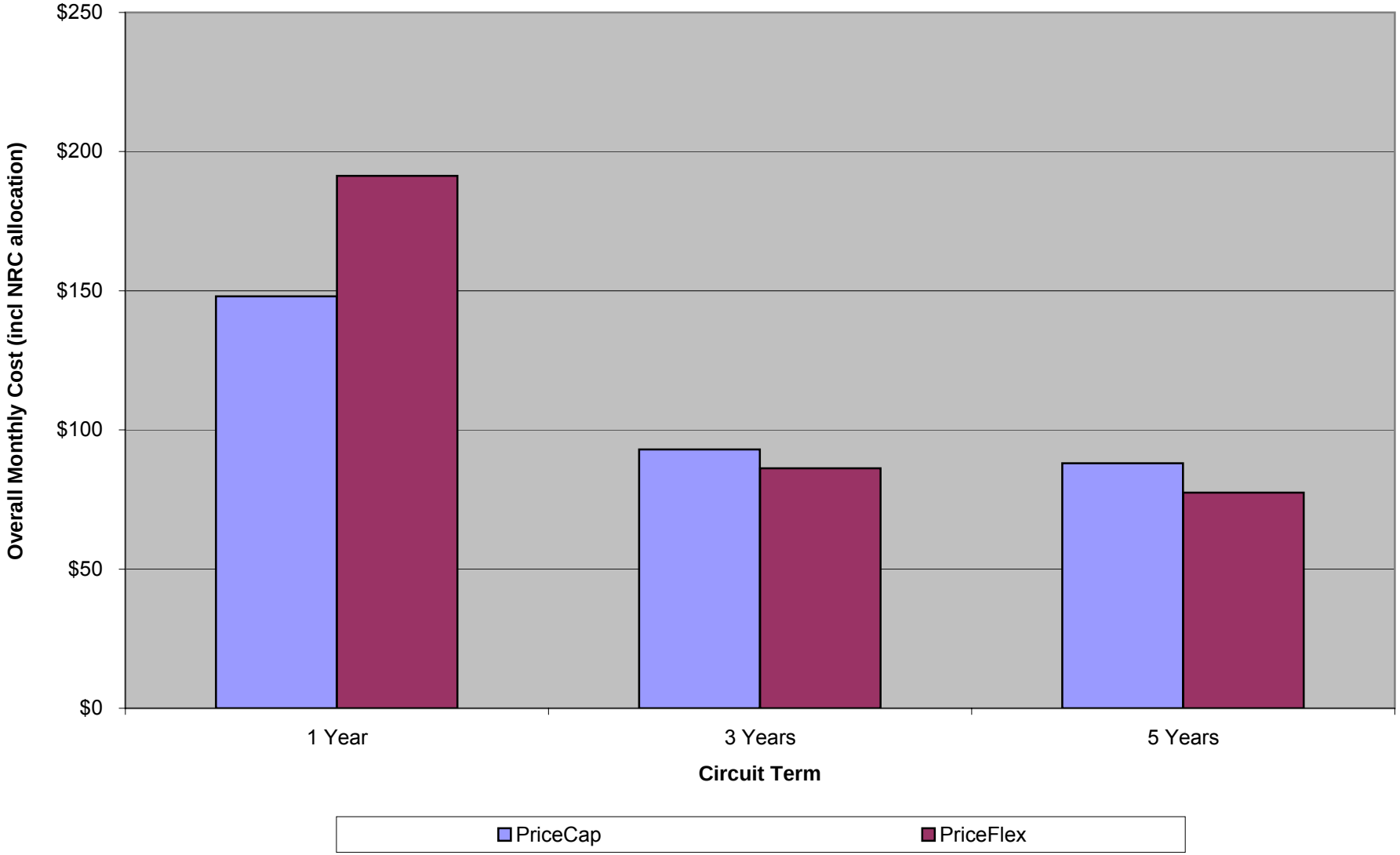
PacBell FCC 1



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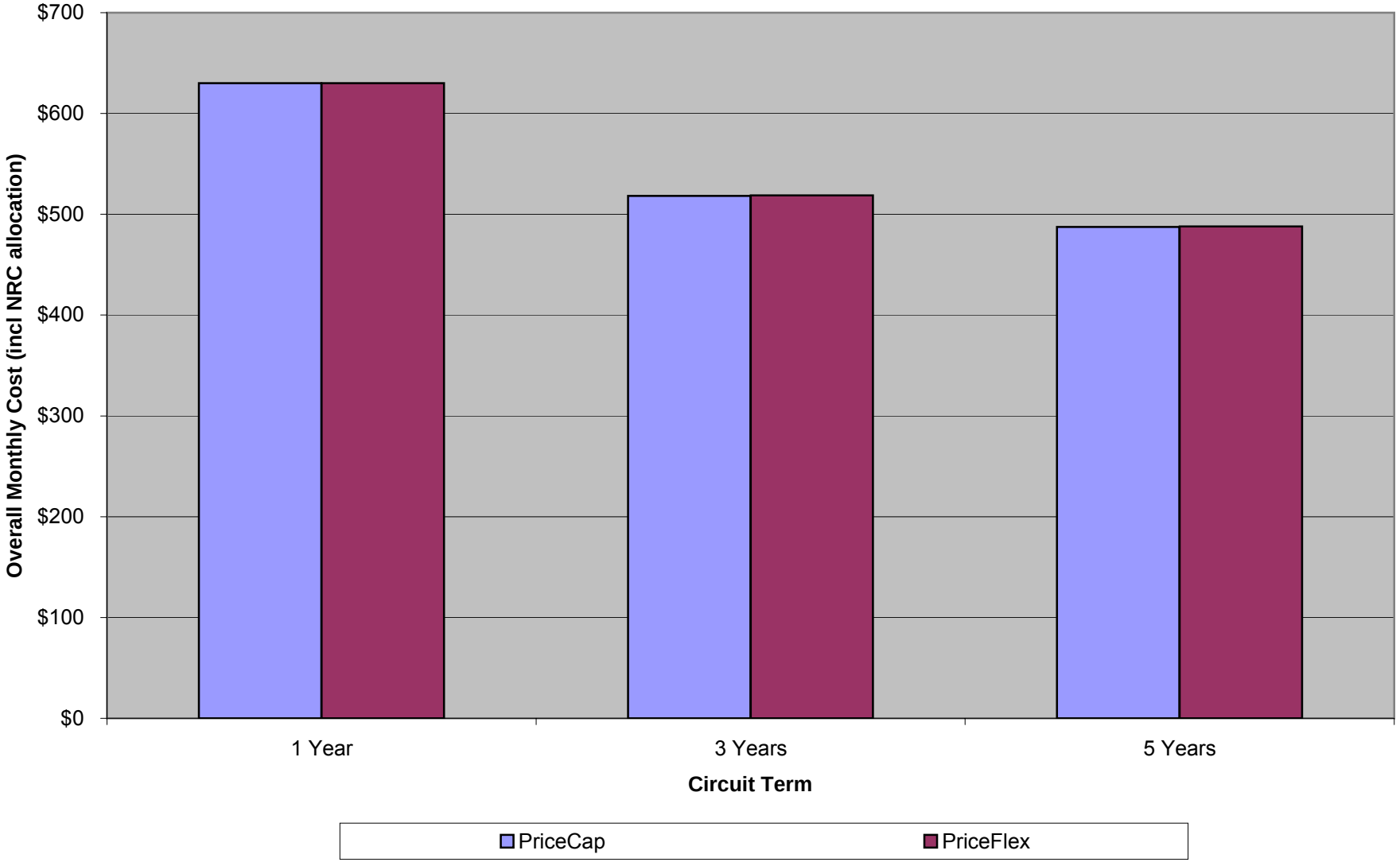
PacBell FCC 1



PriceFlex v. PriceCap Comparison of DS1 Charges - TX Zone 1 - Channel Termination
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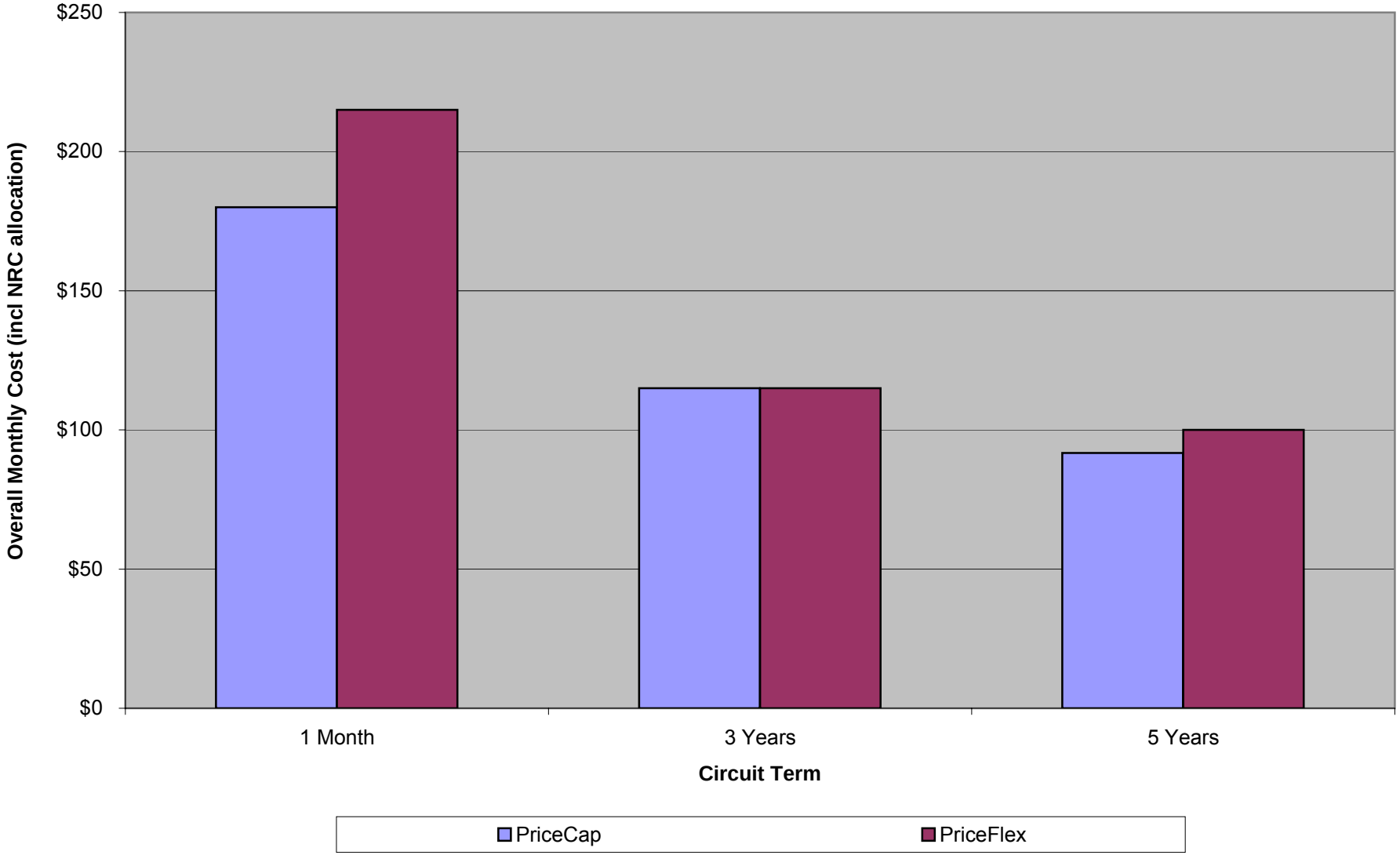

PriceFlex v. PriceCap Comparison of DS3 Charges - TX Zone 1 - Channel Termination
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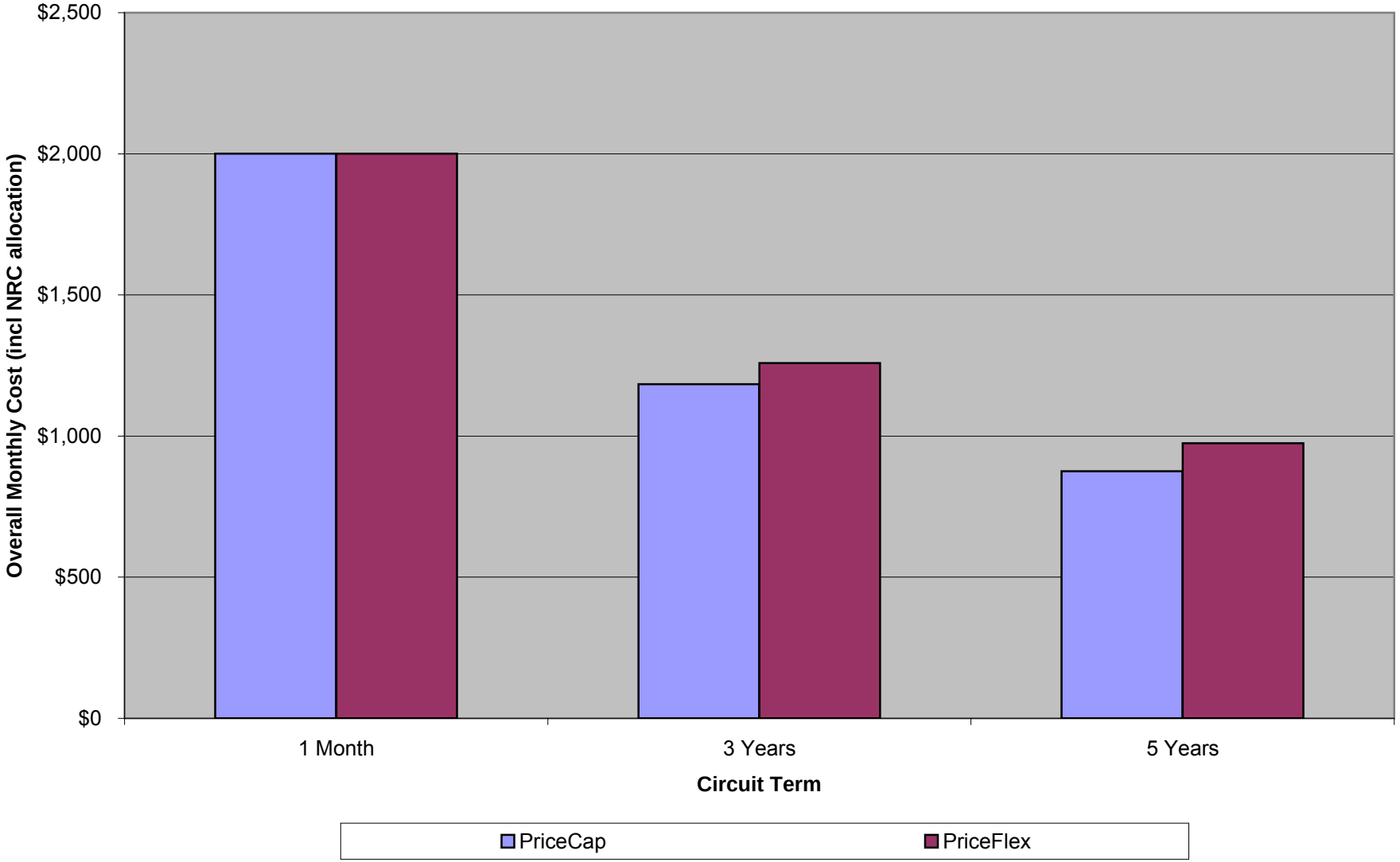

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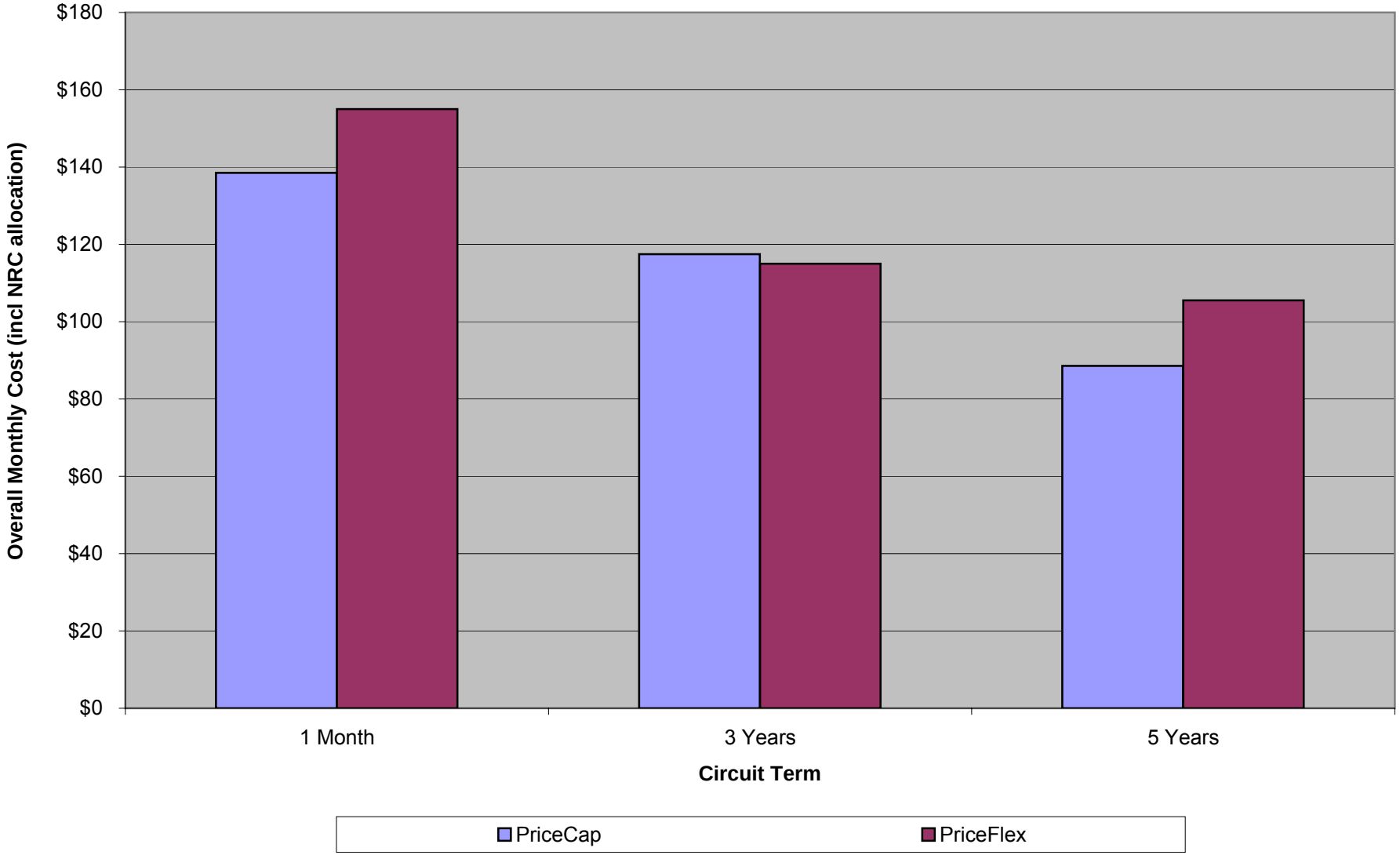

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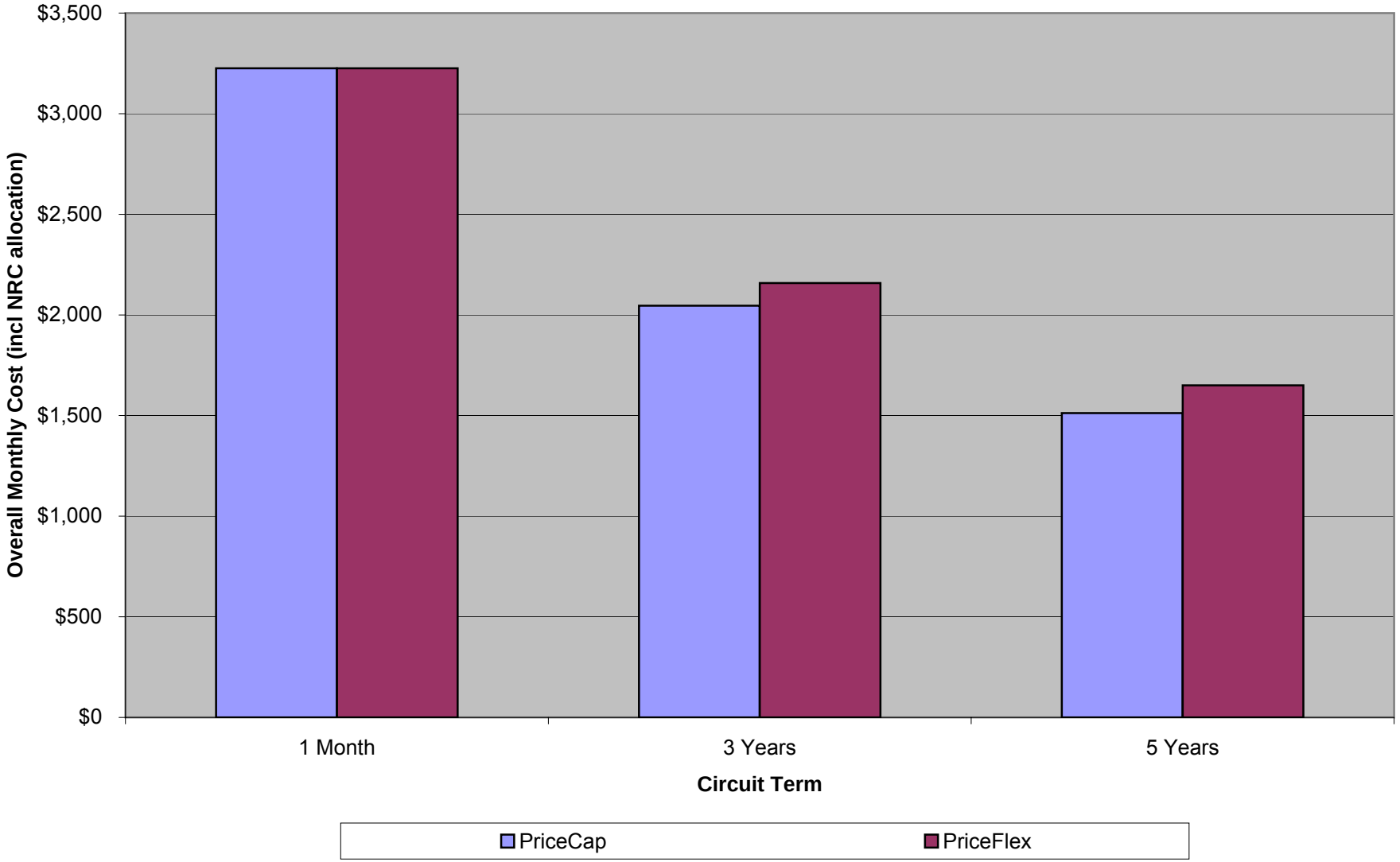

PriceFlex v. PriceCap Comparison of DS1 Charges - Zone 1 - Channel Termination
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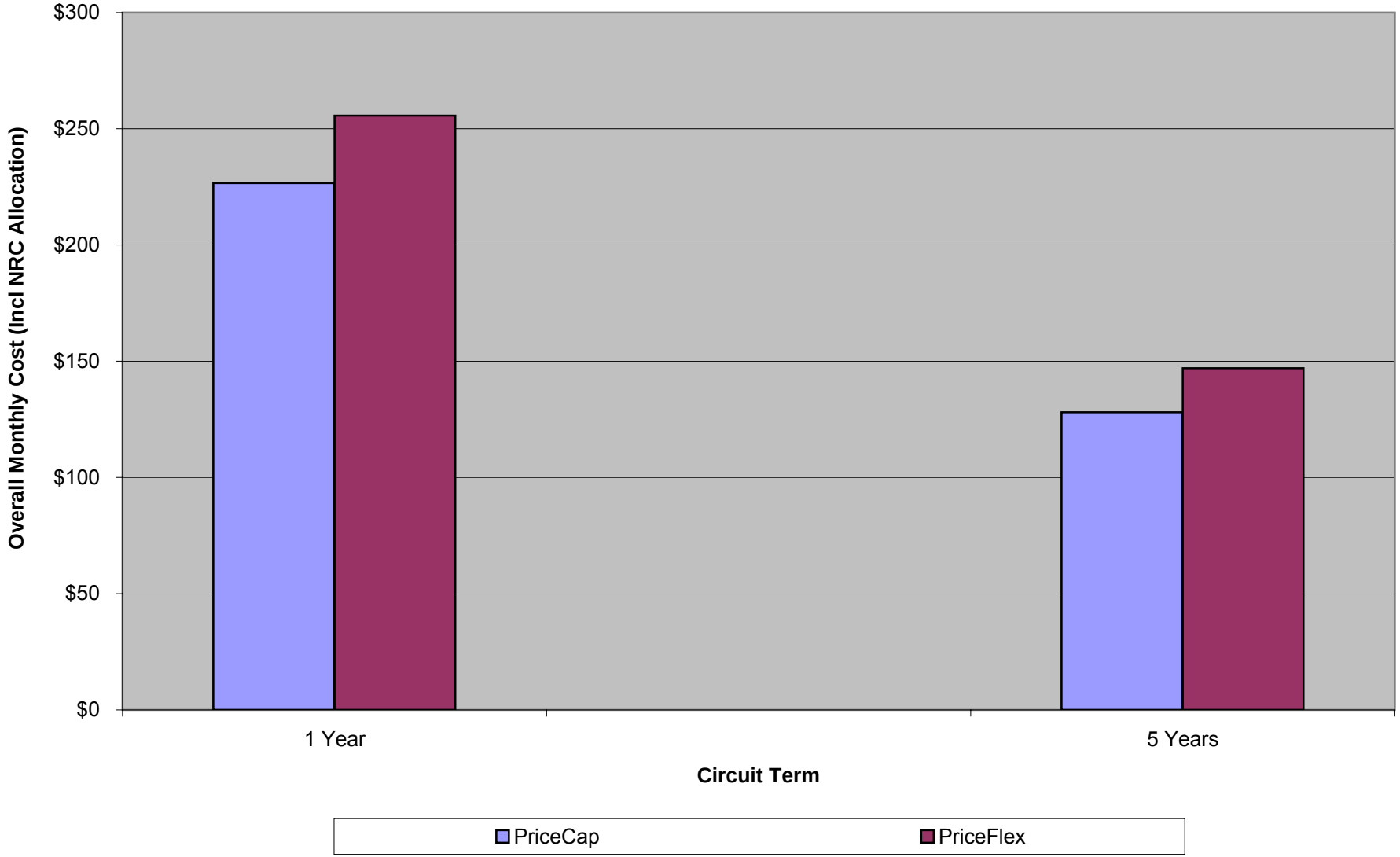
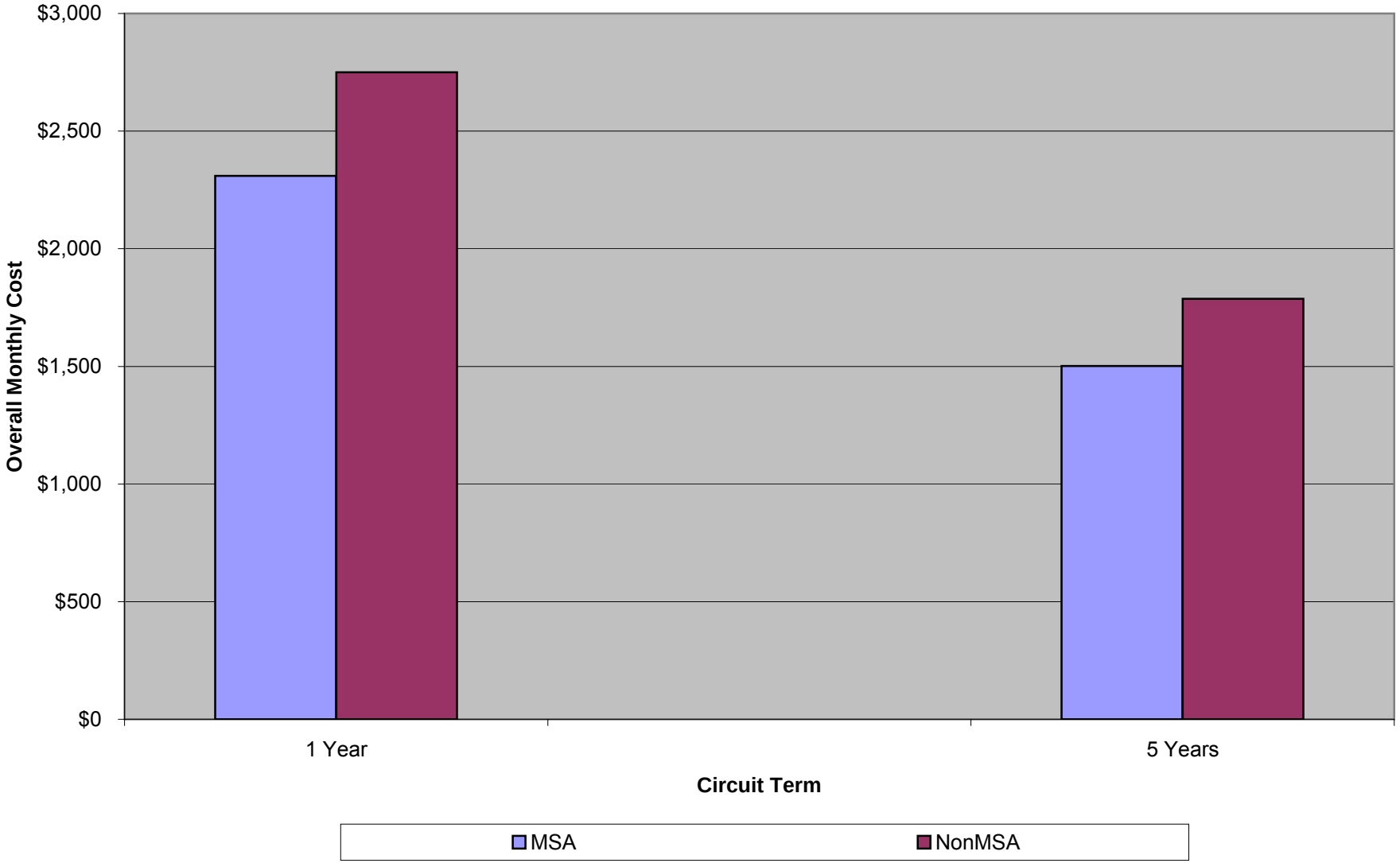


MSA v. NonMSA Comparison of DS3 Charges - Zone 1 - Channel Termination
Verizon (South) FCC 1



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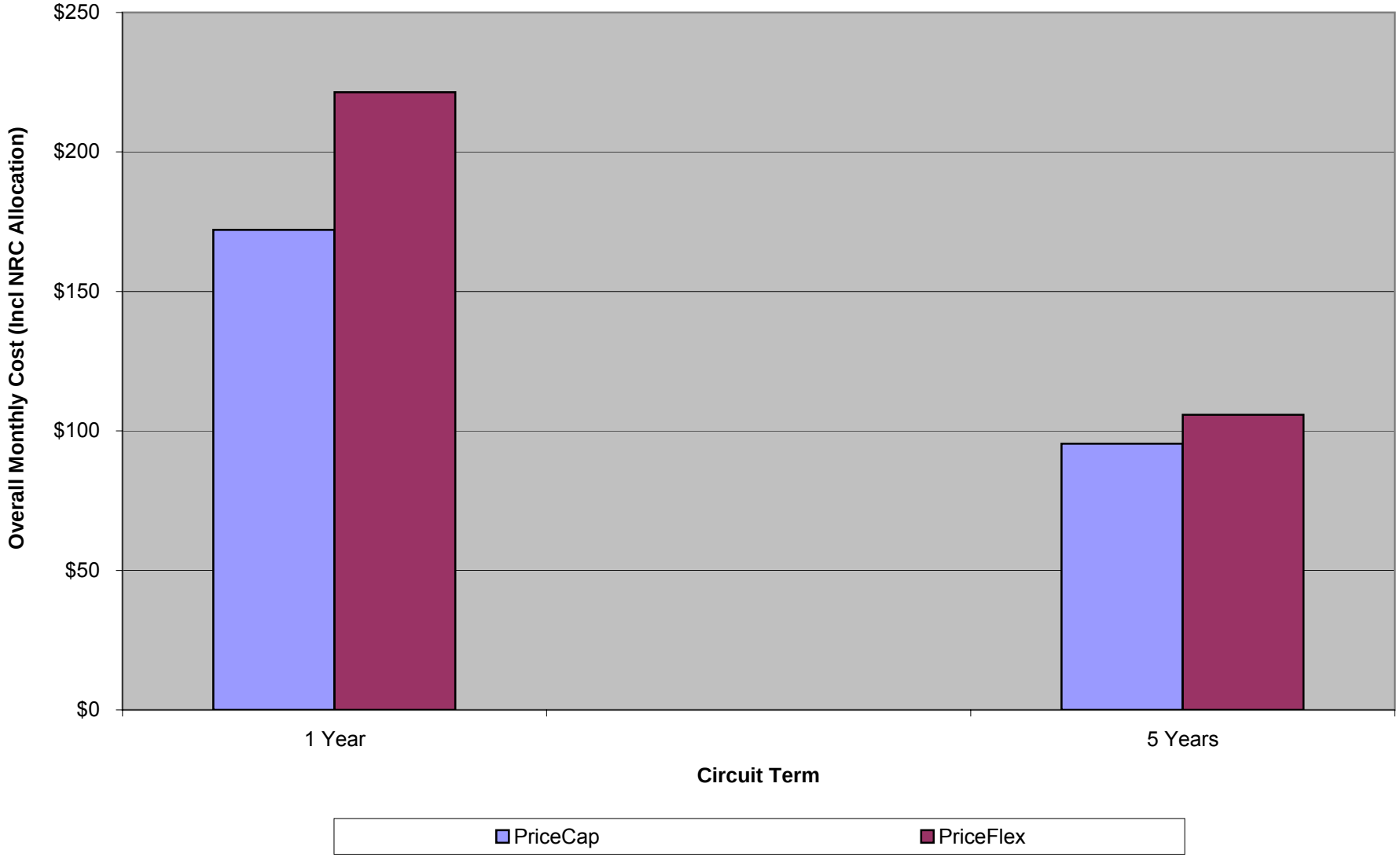
Verizon (South) FCC 1



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Verizon (South) FCC 1

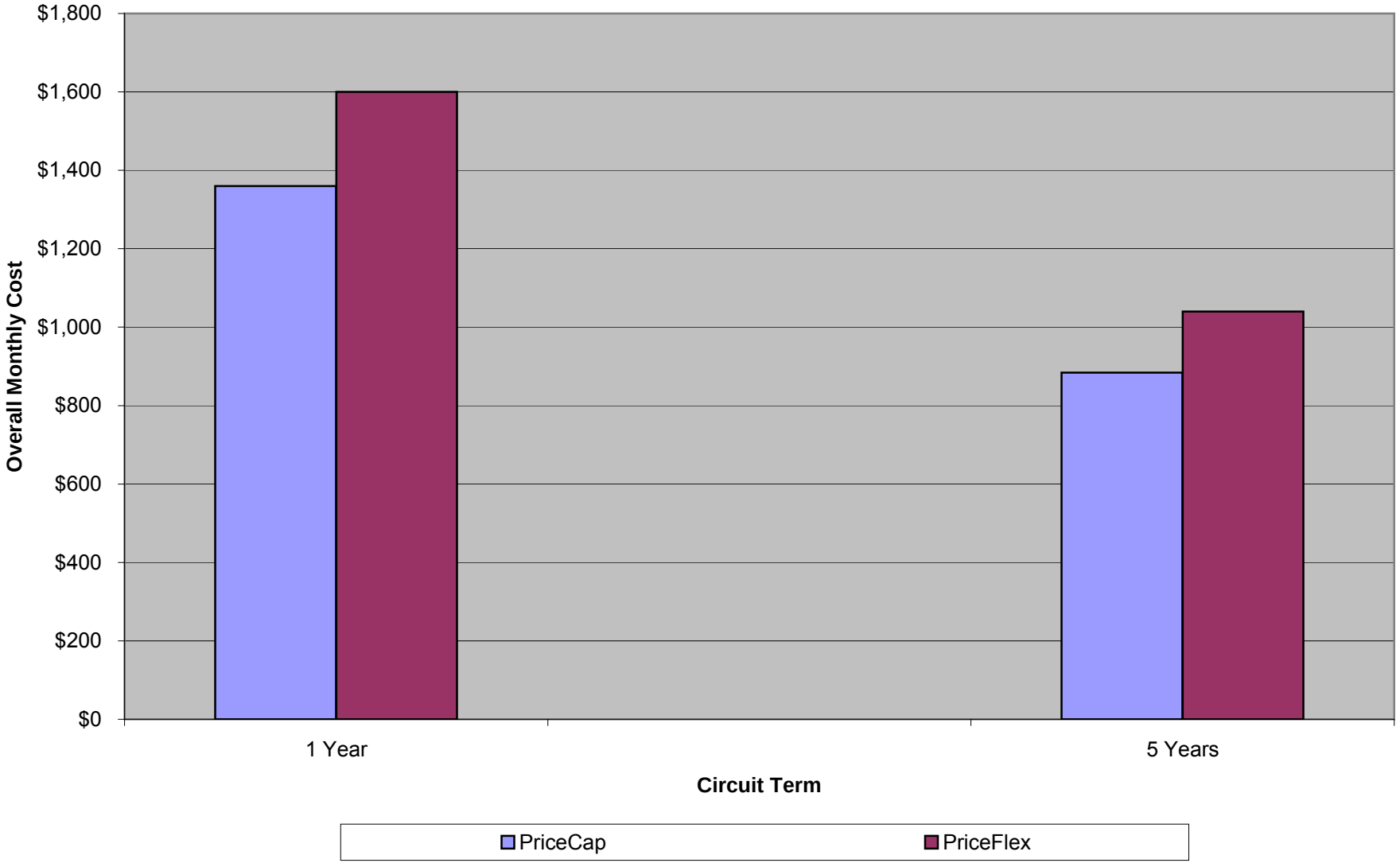

EXHIBIT 7

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Special Access Rates for Price Cap Local Exchange Carriers	**WC Docket No. 05-25**

Reply Declaration

of

LEE L. SELWYN

on behalf of

WilTel Corp.

July 29, 2005

EXECUTIVE SUMMARY

Initial comments filed by SBC, Verizon and BellSouth all attempt to obfuscate their persistent – and growing – monopoly power – and especially their dominance in the market for special access services – with flawed "evidence" and "analysis" that purports to demonstrate that CLECs are easily able to self-deploy special access loop and transport and that current levels of competition are sufficient to constrain prices for special access services. This tired evidence, which has been previously presented by the same RBOCs to this Commission in the *Triennial Review Remand* proceeding (*TRR proceeding*), has been soundly discredited, and nothing in any of the current "updates" being offered by the RBOC Declarants overcomes those fatal defects and factual errors that have rendered this "evidence" and "analysis" useless since the first time it had appeared. In fact, it appears that the current "analyses" are just a continued attempt to muddy the waters and make it more difficult to see the inescapable *facts* that CLECs face substantial hurdles in self-deployment of their own special access facilities, that the RBOCs face extremely limited competition for the provisioning of special access loops and transport (and will face even less competition if the pending SBC/AT&T and Verizon/MCI mergers are permitted to go forward), that the RBOCs' prices for special access services, post-pricing flexibility, have *increased* or been left at pre-pricing flexibility levels that remain higher than prices that have been subject to a mandatory price caps reduction, and that as a result the RBOCs are able to earn astronomical, supra-competitive returns on special access services.

The RBOCs' primary evidence comes in the form of updates to the self-styled *UNE Fact Report*. These updates contain gross misrepresentations based up undocumented and unreliable data with respect to existing deployment of CLEC high capacity networks and, from that distorted perspective, make unsupported contentions about the feasability of additional CLEC deployment. The flaws of the *UNE Fact Report* have been debunked before, and the current updates do nothing to address the underlying mischaracterizations contained therein. The "facts" presented to support the RBOCs' claims do not take into account the critical capacity distinctions that frequently determine whether it is economically feasible for CLECs to deploy facilities at specific customer locations or along specific transport routes. Despite broad claims with respect to competition for high-capacity facilities and services, the updates to the *UNE Fact Report* contain no data at all on the specific availability of competing CLEC facilities for either high capacity transport or high capacity loops at the DS-n capacity levels without access to which the FCC has determined CLECs are impaired. The RBOCs rely on aggregations of claimed CLEC network capacity, obscuring critical data relating to locations and routes actually being served, and services and capacities actually being furnished. When examined in detail, the "evidence" of CLEC competitive networks cited in the updates to the *UNE Fact Report* include route miles of fiber in London, ILEC-owned fiber, gas pipelines, and long haul fiber used to provide interexchange services, among numerous other errors. Moreover, much of the "evidence" of competitive fiber networks provided in the

updates to the *UNE Fact Report* is a hodgepodge of quotes, misused CLEC data, and generalizations that teach nothing about the actual state of competition for high capacity services.

With respect to competition for high-capacity facilities and services, the updates to the *UNE Fact Report* contain no data at all on the availability of competing CLEC facilities for either high capacity transport (special access interoffice facilities) or high capacity loops (special access local channels). Instead, the updates choose to present "data" (discussed below) on "CLEC Networks" followed by unsupported *assertions* that the existence of CLEC networks satisfies a competing carrier's need for both high-capacity transport and high capacity loops. These hollow claims have been rebuffed numerous times by the sworn testimony of various CLEC executives.

To bolster their arguments that special access represents a viable alternative to UNEs, the RBOCs contend that special access prices have decreased since the onset of pricing flexibility. This assertion is patently false. In fact, special access prices have increased (and the price/cost gap has widened) under pricing flexibility, confirming the persistence of the RBOC monopoly with respect to these essential services and facilities. The RBOCs' flawed analyses rely upon contrived and misleading calculations that (1) substitute "average revenue" for actual prices, (2) improperly take credit for mandatory special access rate decreases (in areas where the RBOCs have not obtained pricing flexibility) made pursuant to the Commission's price cap rules, and (3) ignore entirely the fact that during the period covered by the analysis there has been a significant shift in demand toward higher capacity OC-n services, which have a lower price per voice grade equivalent channel than DS-n services. Through these various manipulations, the RBOCs' "evidence" totally obscures the fact that the least competitive DS-n services have been subject to the largest overall rate increases. In making their inflated claims about special access competition, the RBOCs also fail to acknowledge that the only way CLECs have stayed viable in many cases has been by taking advantage of RBOC "optional pricing plan" volume and term contracts for special access services – arrangements that may offer immediate financial benefits, but which operate to lock the RBOCs' CLEC rivals into long-term contractual arrangements that impose often severe financial penalties upon the CLEC either for deploying its own competing facilities or, where available, ordering UNEs to serve the affected locations.

New RBOC analyses that purports to measure capacity-specific pricing trends for DS-1 and DS-3 services suffer from the very same infirmities as the overall "average revenue" method. In actuality, this analysis contains no pricing data whatsoever. Service specific revenue has been substituted for actual prices, and changes in demand and movement to "optional pricing plan" contracts have been entirely ignored. It is impossible to glean any information as to actual pricing trends from this analysis. This new analysis begs the all-important question as to why the RBOCs *still* choose to use special access revenue as a proxy for actual prices when such pricing data is available in the RBOC tariffs. The answer is all too clear: actual prices for special access services subject to pricing flexibility have gone up or been artificially supported at supra-competitive levels, and the only way to view the situation any differently is to ignore and obscure the facts.

REPLY DECLARATION OF LEE L. SELWYN

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Special Access Rates for Price Cap Local Exchange Carriers	**WC Docket No. 05-25**

REPLY DECLARATION OF LEE L. SELWYN

INTRODUCTION

1. My name is Lee L. Selwyn; I am President of Economics and Technology, Inc. ("ETI"), Two Center Plaza, Suite 400, Boston, Massachusetts 02108. ETI is a research and consulting firm specializing in telecommunications and public utility regulation and public policy. I have participated in numerous proceedings before the Federal Communications Commission ("FCC" or "Commission") dating back to 1967, and have appeared as an expert witness in hundreds of state proceedings before more than forty state public utility commissions. I have submitted declarations in several recent dockets of direct relevance to the present rulemaking, specifically, in RM No. 10593, the AT&T *Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services* (January 23, 2003, on behalf of

AT&T Corp.), and in WC Docket No. 04-313, the *Triennial Review Remand* proceeding (October 4 and October 19, 2004, on behalf of AT&T Corp.). I was also a co-author of *Competition in Access Markets: Reality or Illusion – A Proposal for Regulating Uncertain Markets*, a report prepared for the Ad Hoc Telecommunications Users Committee and submitted as an *ex parte* filing by the Ad Hoc Committee in RM No. 10593, in this rulemaking, and in WC Docket Nos. 05-65 and 05-75, the SBC/AT&T and Verizon/MCI merger proceedings, respectively. My complete Statement of Qualifications is annexed hereto as Attachment 1 and is made a part hereof.

2. I have been asked by WilTel to respond to two separate contentions being advanced by RBOCs in this proceeding. First, RBOC claims that competition for special access service is presently sufficient to obviate the need for any changes to the Commission's pricing flexibility rules; and second, claims that special access prices have *decreased* as a result of the Commission's pricing flexibility rules. In this declaration, I demonstrate that these various claims are without merit and are, in fact, precisely opposite to "on the ground" reality.

THE RBOCs' COMPETITIVE EVIDENCE IS FLAWED

The RBOCs continue to rely upon discredited "evidence" that they had previously advanced in the Commission's *Triennial Review Remand* proceeding.

3. Faced with the daunting task of attempting to demonstrate a vibrant competitive landscape for special access services where none exists, the RBOCs have trotted out the same flawed evidence that they relied so heavily upon in the *Triennial Review Remand* proceeding:[1] specifically, the so-called *UNE Fact Report* ("*Fact Report*") authored by RBOC attorneys Peter Huber and Evan Leo.[2] In the *Triennial Review Remand* proceeding, the RBOCs had posited the argument that UNEs were unnecessary because CLECs were already competing throughout the RBOC territories (as purportedly demonstrated by the *Fact Report)* and that to the extent that CLECs were impaired in their ability to self-provision services in a particular location, *special access* services were available in place of UNEs..

1. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-989; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (*TRR Proceeding*).

2. *UNE Fact Report 2004*, Peter W. Huber and Evan T. Leo, Prepared for and Submitted by BellSouth, SBC, Qwest and Verizon, October 4, 2004 ("*UNE Fact Report*"). Unless otherwise noted, all citations refer to Section III of this report.

4. The Commission soundly rejected the RBOCs' contention that the availability of special access provided a reasonable alternative to UNEs.[3] In the instant rulemaking proceeding, a similar argument is being put forth by the RBOCs, only this time the argument seems to be that regulation of special access prices is unnecessary because competition for special access services is rampant (as purportedly demonstrated once again by the *UNE Fact Report*),[4] and that even in those places where it is not, UNEs are still available to discipline special access prices.

5. The continued reliance upon the *UNE Fact Report* at this point in time is particularly noteworthy because, at the time that it was written (in late 2004), both AT&T and MCI were included (as they should have been) as RBOC competitors. Clearly that status is no longer valid. AT&T is seeking to be swallowed up into SBC, and MCI is seeking to be absorbed into Verizon. Certainly it is no longer appropriate to count AT&T "last mile" and transport assets within the 13-state SBC footprint as competing facilities, and for the same reason it is no longer appropriate

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3. *Triennial Review Remand ("TRR") Proceeding, Order On Remand*, 20 FCC Rcd 2533 (2004) ("*TRRO*").

4. *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of Verizon, filed June 13, 2005, ("*Verizon Initial Comments*") at 24-35; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of BellSouth, filed June 13, 2005, ("BellSouth Initial Comments") at 13-23; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of SBC Communications, filed June 13, 2005, ("SBC Initial Comments") at 9-20. Declaration of Howard Furchtgott-Roth and Jerry Hausman on Behalf of BellSouth, WC Docket No. 05-25, June 13, 2005 ("*Furchtgott-Roth/Hausman WC 05-25, (BellSouth)*") at 13-17 and 31; Declaration of Quintin Lew on Behalf of Verizon, WC Docket No. 05-25, June 13, 2005 ("*Lew Declaration, (Verizon)*") at Parts I and II and Appendix Tables; Declaration of Eric Bruno on Behalf of BellSouth, WC Docket No. 05-25, June 13, 2005 ("*Bruno WC 05-25, (Verizon)*").

to include MCI as a competitor to Verizon within any of the Verizon operating areas. The withdrawal of both AT&T and MCI as RBOC "competitors" is underscored by both firms' submissions (or in the case of MCI, lack of submissions) in the instant rulemaking. AT&T was the *moving party* behind the Commission's current review of special access pricing and pricing flexibility, yet in the instant rulemaking had confined itself to a perfunctory *eight-page* comment with no supporting evidentiary declarations. MCI took a pass altogether. Indeed, if post-merger SBC and post-merger Verizon do intend to compete out-of-region as they so vociferously claim, they would presumably have the same interest in securing cost-based special access rates as any of the other non-RBOC parties submitting comments and evidence in this docket. The continuing opposition on the part of both SBC and Verizon to special access pricing reform – and the "gun jumping" silence of pre-merger AT&T and MCI – speak volumes as to their true post-merger out-of-region competitive intentions.

6. Despite the known infirmities in the *UNE Fact Report*, which I will describe in more detail later, BellSouth, SBC and Verizon continue to rely upon it and similar unfocussed and ill-conceived studies of their own that mimic it.

7. BellSouth pins its evidence of "robust" and "substantial" special access competition upon a market share analysis developed by Declarant Stephanie Boyles of RHK.[5] The RHK study apparently begins with a review of several other consultants' "studies" or analyses of overall US

5. *BellSouth Initial Comments*, at 13, at 23 -37; Declaration of Stephanie Boyles on behalf of BellSouth, WC Docket No. 05-25, June 13, 2005 ("*Boyles WC 05-25 decl., (BellSouth)*").

"enterprise" private line demand, combined with some other unspecified data on businesses located in the BellSouth footprint, and from that comes up with an "estimate of total enterprise demand for data circuits in BellSouth's footprint."[6] I say "apparently" because Ms. Boyles does not provide any source data, any information on the methodology that RHK had used, if any, to translate the nationwide studies (simply identified as "Vertical Systems" and "Frost and Sullivan" "estimates") into BellSouth-specific data or to validate the robustness of the data. The remaining steps in the "market share" analysis involved nothing more than subtracting BellSouth's services from the "estimated" total demand. The Boyles study purportedly measures market share using three separate metrics, *viz.*: "product units sold," "capacity," and "revenues."[7] In truth, all three of these metrics are created from the very same undocumented and unsupported studies identified above. While BellSouth waxes eloquently for fifteen pages in its *Comment* as to the import of the *results* of Ms. Boyles' study, she herself describes and documents the entire thing in seven paragraphs and a handful of Powerpoint slides. The

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6. It is not clear whether the RHK market share numbers include all BellSouth special access services, for example, services provisioned to *wireless* carriers, or whether some classes of circuits are excluded. The demand and pricing evidence provided in Attachments 3 and 5 of BellSouth's filing specifically, and inexplicably, exclude wireless services – numbers included in the short powerpoint presentation included as Appendix A to the Boyle Declaration suggest that the RHK analysis may as well. Review of Attachment 5 in conjunction with the special access revenues reported by BellSouth in ARMIS for 2004 reveals that the "wireline" special access revenues make up only about half of BellSouth's special access revenues. (ARMIS 2004 Special access revenues = $2.4-Billion: Total "wireline" special access revenues documented on Attachment 5 = $104-million per month, annualized this is $1.25-Billion, or just over half of total reported special access revenues.) If and to the extent that half the special access market is excluded from the RHK study, the results are meaningless.

7. BellSouth Initial Comments, at 24.

Commission is supposed to take these market share numbers "as is" without any supporting documentation, and with no ability to replicate or verify them. Clearly it should not do so.

8. Ms. Boyles creates a revenue-based market share estimate by taking the demand estimates developed in the "product units sold" study and multiplying them by estimated unit prices for BellSouth special access services, BellSouth UNEs, and alternative access service provider services.[8] Once again, no documentation is provided to explain how the unit prices were developed (although Ms. Boyles does identify some data sources). She documents that the average special access and UNE prices that she had used were provided by BellSouth, and that the "average" DS-1 price is $240.[9] Yet in its pricing evidence included in Attachment 3 in this very filing, BellSouth develops a reported "average" revenue per DS-1 circuit of $313.85 for 2004. No explanation is offered by either Ms. Boyles or by BellSouth as to which number is correct (if indeed either number is correct), or why they are different.

9. Even taking the Boyles market share numbers on their face, however, BellSouth's vision of a "robustly competitive" market is clearly not supported. The RHK study documents that BellSouth's market share for circuits is 89% (combined special access and UNE demand) for DS-1 local channels. But a review of Ms. Boyles' *results* included in Appendix A to her declaration reveals that DS-1 tail circuits represent 97.7% of the total special access tail circuits

8. Boyles decl., at paras. 6-8.

9. *Id.*, at para. 7.

reported to Ms. Boyles by BellSouth. The BellSouth data used by Ms. Boyles shows BellSouth as providing a total of 234,465 DS-1 "tail" circuits (as UNEs or Special Access). Ms. Boyles' estimate of the entire OCn market for tail circuits is less than 2,000 (1,615).

10. Harold Furchtgott-Roth and Jerry Hausman, in a joint Declaration for BellSouth, base their finding of competitive conditions in the special access market upon the *UNE Fact Report*[10] and upon very similar research conducted by reviewing recent marketing materials on carrier websites. The Furchtgott-Roth/Hausman table included all providers that indicated both that they had "facilities" in a metro area, and that they offered special access. No effort appears to have been made to ascertain whether the "special access" services being offered were being provided over the carriers' *own* facilities, or whether the special access services in question were resold ILEC special access services. In any event, as I discuss in more detail below, this kind of casual website-based research produces little useful information. More to the point, even if the Furchtgott-Roth/Hausman research is correct as to the number of alternative access providers offering some form of special access services over their own facilities in some part of a particular metro area (a scenario that is unlikely to be true), it provides no information as to the level of competition available for the most widely-used special access services – those operating at speeds *below OCn levels.*

10. Furchtgott-Roth and Hausman Declaration, at 14-16 and 31.

11. Rather than citing the *UNE Fact Report* by name, Verizon replicates much of the data from that report under the guise of "new" analyses by its Declarants Quentin Lew and Eric Bruno,[11] based upon which it purports to find the existence of "extensive facilities-based competition wherever significant special access demand exists." Lew's declaration is almost entirely premised upon data originally presented in the Triennial Review Remand proceeding, and presents an update to several *Fact Report* tables in the appendices to his declaration. Lew's Appendix A contains details of a Verizon-specific analysis of CLEC fiber deployment that had originally appeared in a Verizon *ex parte* filed in CC Docket No. 01-338 on July 2, 2004, which I had extensively rebutted in a Declaration I prepared on behalf of AT&T in that same proceeding, filed on October 4, 2004.[12] Lew's Appendix B is a rework of Table 1 of the original *UNE Fact Report*, suffering from many of the infirmities that made the original work completely useless. Appendix C of the Lew Declaration (entitled "Wholesale Suppliers of Special Access Services") is a rework and compilation of data contained in the original *Fact Report*, Appendix III Tables 2, 3, 7, 14, 15, and 16. Eric Bruno's Declaration, while it contains some newly presented "data," represents nothing more than the same old overblown compilation of telecom website and advertising materials – in this case roping in materials for everybody from equipment

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11. Verizon initial comments, at 22.

12. *Competing Providers Are Successfully Providing High-Capacity Services to Customers Without Using Unbundled Elements*, *Ex Parte* Submission of Verizon Communications in CC Docket Nos. 01-338, 96-98, 98-147, filed July 2, 2004 ("*Verizon July 2, 2004 ex parte*"); Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Declaration of Lee L. Selwyn on behalf of AT&T Corp., October 4, 2004 ("*Selwyn TRR Declaration*"), at para. 36.

manufacturers to systems integrators, apparently hoping that the Commission will believe these diverse entities represent special access competitors.

The data that the RBOCs rely upon from the *UNE Fact Report* grossly misrepresents the actual extent of CLEC loop/transport self-deployment and exaggerates the actual presence of price constraining special access competition.

12. The RBOCs' *UNE Fact Report* seeks to portray extensive deployment of CLEC facilities in areas where, it contends, customer demand is greatest. CLECs, the *Fact Report* argues, can serve and are serving a large number of enterprise customers using their own facilities, fixed wireless services and cable television facilities, and where none of these are available "competitors can readily use the ILEC's tariffed special-access services to fill out any remaining gaps in their coverage."[13] In fact, the *UNE Fact Report*'s own data, together with sworn testimony by a number of CLEC executives and network engineers that were also filed in the *Triennial Review Remand* proceeding, paint an entirely different picture. Describing those portions of the overall enterprise market where CLECs require the use of RBOC network facilities merely as "remaining gaps in their coverage" would be like describing the Pacific Ocean as a "gap" between San Francisco and Tokyo. In fact, these "gaps" in CLECs' coverage constitute the vast, overwhelming majority of all enterprise customer locations nationwide.

13. *Id.*, at III-2.

13. Moreover, in the instant case, since the *UNE Fact Report* data is being relied upon as evidence to demonstrate competitive alternatives available to compete *with special access services*, the ability of those same special access services to "fill out any remaining gaps" is nil. If CLEC facilities are not available to compete with special access, there is nothing to constrain ILEC pricing of those services.

14. As has been the case with the various submissions made by the RBOCs in this and the *Triennial Review Remand* proceeding, the *UNE Fact Report* fails to draw any distinctions among the various segments of the overall enterprise market, distinctions that materially affect CLECs' ability to provide competing services using either their own or other non-ILEC facilities, and correspondingly the ability of those CLECs to discipline the RBOCs. Even taking the *Fact Report*'s data on CLEC facilities deployment at face value for purposes of discussion, CLECs have deployed facilities at less than 31,669 enterprise customer locations, i.e., at *less than one percent of all commercial buildings nationwide.*

15. Not even mentioned in the *UNE Fact Report* is the *fact* that virtually all of the customer sites at which CLEC facilities have been deployed involve services at the OCn level. Nowhere does the *Fact Report* provide *any evidence* of CLEC loop facilities being constructed at locations where the customer's requirement is at the DS-1 level – or even as much as two DS-3s. In the *TRO*, the Commission determined that CLECs *have not deployed their own facilities to any*

measurable degree where the customer demand is less than three DS-3s.[14] Significantly, *no facts in the UNE Fact Report refute or, for that matter, even address this critically important finding.* Apparently, the RBOCs are hoping that if they fail to distinguish between the DSn and OCn segments, the Commission will simply *infer* from the highly limited CLEC presence at the very high end of the enterprise market that the *entire enterprise market* confronts precisely the same level of facilities-based competition. And, indeed, such an inference is just what the RBOCs would require, since there are decidedly no "facts" anywhere in the *Fact Report* that would actually and directly support such a conclusion.

16. The *UNE Fact Report* contains such gross misrepresentations and unreliable data with respect to CLEC high capacity networks that are represented in this proceeding as constraining special access pricing that it can only provide a highly distorted picture of actual CLEC facilities deployment and business presence. First, with respect to competition for high-capacity facilities and services, the *Fact Report* contains no data at all on the specific availability of competing CLEC facilities for either high capacity transport or high capacity loops. Instead, the *Fact Report* chooses to present "data" (discussed below) on "CLEC Networks" followed by

14. *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96- 989; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC No. 03-36, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), 18 FCC Rcd 17155, at para. 298.

unsupported *assertions* that the existence of CLEC networks fully satisfies a competing carrier's need for both high-capacity transport and high capacity loops.

17. This "evidence" of competitive fiber networks is a hodgepodge of quotes, misused CLEC data, and generalizations that teach nothing about the actual state of competition for high capacity services. For example, the *UNE Fact Report* begins its description of competitive networks by citing the *TRO* as stating that the Commission had found that competitive fiber was available in large and small markets throughout the country.[15] In fact, the Commission in the *TRO* made no such finding. It devoted significant time and effort to delineate proper geographic and capacity level product markets that identified specifically those limited instances where CLECs were not impaired without access to UNEs. The *Fact Report*'s statement obscures all these considered distinctions, which are only identifiable through a close examination of the *Fact Report*'s footnotes, where the *Fact Report* cites several *TRO* findings to the effect that, in "some areas" and at some capacity levels, CLECs have deployed their own fiber. The *UNE Fact Report*'s attempt to attribute an overarching statement regarding the ubiquity of competitive fiber to these location- and capacity-specific Commission statements is both disingenuous and misleading.

18. Tables 7 and 8 of the *UNE Fact Report* purport to show "High-Capacity Service offerings over Competitive Fiber" and that "CLECs Use Their Networks to Provide *Local*

15. *UNE Fact Report*, at III-3

Services." Both of these tables, however, consist of nothing but marketing statements from CLECs regarding service availability, and generally make no claims regarding the exclusive use of the CLEC's own self-deployed fiber. In fact, CLECs often use the term "on-net" or otherwise characterize facilities as being on "their network" when describing *either* owned or leased facilities. There is no reason to assume that *any* of the carriers cited in Tables 7 or 8 are referring to services generally available to customers served entirely and exclusively over the CLECs' own wholly owned facilities.

19. CLECs filing comments in the *Triennial Review Remand* proceeding confirmed the fact of severely limited non-ILEC wholesale availability of loop facilities. XO Communications director of Transport Architecture explained that

> Because of limited building presence from other CLECs, we rarely have been able to purchase DS-1 and DS-3 loop facilities from other CLECs. This is true of all of our markets across the nation. Indeed, we found that CLECs offer DS-1 and DS-3 loops on a wholesale basis to *fewer than 5 percent* of the buildings that XO serves.[16]

Similarly, Xspedius stated that it "rarely would be able to purchase DS-1 loop facilities from other CLECs. This is true of all of our markets across the nation."[17] Eschelon Declarant Kunde explains that

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16. Declaration of Wil Tirado on Behalf of XO Communications, Inc., WC Docket 04-313, October 1, 2004 ("*Tirado (XO)*"), at para. 21, emphasis in original.

17. Declaration of James C. Falvey on Behalf of Xspedius Communications, LLC, WC Docket 04-313, October 1, 2004 ("*Falvey (Xspedius)*"), at para 26.

> If self-provisioning and acquiring high-capacity network elements from third-party providers were realistic alternatives to ordering them from ILECs, CLECs would have little reason to order them from ILECs. CLECs, such as Eschelon, continue to require access to Qwest's unbundled high-capacity loops, however, because self-provisioned and third-party provided high-capacity loops are not available to serve the vast majority of our customers. Relatively few of Eschelon's customers are located in big downtown office buildings that may be 'lit' by competitive facilities.[18]

20. It is possible to contrast this sworn CLEC evidence with the assertions made in the *UNE Fact Report* regarding the claimed availability of wholesale services. Table 9 in the *Fact Report* purports to provide a list of high-capacity wholesale services offered by competitive fiber carriers. In every case, the sources for the carriers' "wholesale" offerings are statements made on their respective websites or in the carriers' marketing materials. These sources lack specificity, and provide no details as to the precise type, location or price of the services that the *Fact Report* alleges are being offered. Without such specifics, it is not possible to verify the actual extent and viability of these "wholesale offerings." Indeed, from the "facts" presented in Table 9, it is impossible to determine if all of the carriers listed provide wholesale services *to even one CLEC.* In at least one case, a carrier cited by the *Fact Report* as providing wholesale services – KMC – presented sworn testimony in WC 04-313 that it is not equipped to provide such services.[19]

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18. Declaration of David A. Kunde on Behalf of Eschelon Telecom, Inc., WC Docket 04-313, October 1, 2004 ("*Kunde (Eschelon)*"), at para. 16. Similar statements are contained in the Declarations of all CLEC Coalition witnesses (See fn. 44, *infra.*)

19. Declaration of Mike Duke on behalf of KMC Telecom Holdings, Inc., WC Docket 04-313, October 1, 2004 ("*Duke (KMC)*").

Even where these carriers *do* provide limited wholesale services, the fiber networks owned and operated by these CLECs are inadequate to establish the actual availability of competitive wholesale facilities where required by CLECs. For example, QSI Consulting, Inc. had examined ILEC claims as to the presence of trigger-satisfying wholesale providers against specific evidence introduced in state *TRO* proceedings.[20] According to QSI, ILECs had *claimed* that dark fiber was available at 954 locations, whereas the evidence put that figure at zero. QSI also noted ILEC claims of DS-3 and DS-1 wholesale availability at 719 and 724 locations, respectively, whereas its examination identified only 49 DS-3 and 36 DS-1 locations. Finally, whereas the *Fact Report*'s Table 9 purports to identify some 32 CLECs as providing wholesale services, QSI had advised me that in eighteen state proceedings that it had reviewed, fully seventeen of the companies listed in the *UNE Fact Report*'s Table 9 had not been specifically identified by the petitioning ILECs as satisfying any wholesale triggers.[21] Note that at that time the separate existence of AT&T and MCI would have been included into any "trigger" count; with both now out of the CLEC column, the instances where triggers have been satisfied is undoubtedly less than it had been last fall.

21. Claims advanced in the *UNE Fact Report* with respect to fixed wireless present speculations as facts regarding the ability of fixed wireless operators to expand the geographic

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20. *Selwyn TRR Declaration,* at paras. 45-62.

21. The carriers not identified were Lightpath, Cavalier, TelCove, Comcast, SIGECOM, ChoiceOne, American Fiber Systems, City Signal, LightCore, Northeast Optic, OnFiber, ConEd Communications, PPL, El Paso, Lafayette, Southern Telecom, and AGL.

scope of high-capacity networks. At present fixed wireless technology faces significant hurdles in attracting and serving enterprise customers. But now the *Fact Report* notes that "[t]he fixed wireless industry was not doing well at the time the *Order* was issued, but it has been dramatically revived since."[22] The "dramatic revival" to which the *Fact Report* refers is the IEEE industry standard (802.16a), which was recently finalized. However, as the *Fact Report* notes only in a footnote, "[i]nitial vendor tests are scheduled for the third quarter of 2004, and certified equipment is expected in the market by the first half of 2005."[23] With the exception of WilTel, every carrier identified in Table 15 of the *Fact Report*, "CLEC Use of Fixed Wireless to Extend Fiber Networks," and now incorporated into Appendix C of the *Lew Declaration* in this proceeding, is described as "checking out," "looking at," "looking for," "working with," or "in trials" to use fixed wireless, with statements couched in terms such as "could be a very meaningful breakthrough possibility."[24] The new "WiMax" standard is still in its infancy and, as previous excitement over earlier versions of fixed wireless service have shown, technologies rarely live up to their hype. Indeed, this is confirmed by testimony submitted by XO, which is, or more accurately intends to be, in the fixed wireless business. XO states that it has

> ... invested nearly $1 billion in acquiring LMDS spectrum at the 28, 31 and 39 GHz frequencies, which in combination potentially covers 95 percent of the population of the 30 largest U.S. cities. We made this investment in the hope and expectation that we eventually will be able to use fixed wireless technology as a local loop

22. *UNE Fact Report*, at III-20.

23. *Id.*, at III-20, fn. 52.

24. *Id.*, at Table 15, and *Lew Declaration (Verizon)* at Appendix C.

> substitute... Despite our best efforts, the roll-out was a failure... The results of our testing show that... at some indeterminate future point, wireless loops likely will be able to function as substitute for more than 5 DS-1s or DS-3 local loops in some situations. However, it is very clear that widespread commercial deployment of wireless local loops will not occur in the near future. In addition, when it does happen, the wireless local loops solution will only be useful in isolated situations that are conductive to use of the technology.[25]

The Commission can hardly base a finding of price constraining competition in the special access market on a technology that even substantial investors admit is not yet a viable commercial option, and indeed will never be suitable for large portions of the enterprise market.

22. Statements such as those cited above from XO belie the claims made in the *UNE Fact Report* regarding the extent of fixed wireless use. Table 13 claims that 40% of enterprise businesses, 29% of mid-sized business, and 23% of small businesses report using fixed wireless.[26] However, the *Fact Report* provides no indication of the *extent* to which these companies use fixed wireless – which use is, in all likelihood, extremely limited – or, for that matter, what precisely would constitute "use" of "fixed wireless." For example, does use of a wireless local area network ("LAN") driven by a wireless router than can be purchased for less than $100, constitute "use of fixed wireless?" Is Starbucks counted as a "user" of fixed wireless because it provides wireless "hot spots" in its stores that provide Internet access to Starbucks customers, with the connection between the individual store and the host ISP being accomplished

25. *Tirado (XO)*, WC Docket No. 04-313, at paras. 23-35.

26. *UNE Fact Report*, at Table 13.

using *wireline* facilities? Indeed, the small number of providers cited, and the limited scope of their service offerings (e.g. most of the fixed wireless providers cited in Table 14 provide service in one or two smaller cities), make it highly unlikely that 40% of large enterprise have adopted fixed wireless in any significant way.[27]

Loops

23. With respect to competition for high-capacity facilities and services, the *UNE Fact Report* contains no data at all on the availability of competing CLEC facilities for either high capacity transport (special access interoffice facilities) or high capacity loops (special access local channels). Instead, the *Fact Report* chooses to present "data" (discussed below) on "CLEC Networks" followed by unsupported *assertions* that the existence of CLEC networks satisfies a competing carrier's need for both high-capacity transport and high capacity loops. By presenting only highly aggregated data that does not even recognize *any* capacity-based distinctions, that does not differentiate between fiber deployed for customer premises connections (loops) vs. transport, or in some cases that does not even distinguish between "local" and "interexchange" fiber, the *Fact Report* does not even address, let alone contribute any "facts" to support, the kind of specific impairment analysis that the Commission has determined to be necessary.

24. Loop facilities represent a sunk cost to a CLEC that is largely or entirely unrecoverable through any other means if the customer ceases taking service from the CLEC, except in the

27. *Id.*, at Table 14.

unlikely event that a new customer demands service at the same location. Finally, the effect of the RBOCs' first mover advantage with respect to preferential access to buildings, access to rights-of-way, higher risk of new entrant failure, substantial sunk capacity, operational difficulties, and marketing and brand preferences, are all more pronounced with respect to specific local loop routes than with transport facilities.

25. Sworn testimony offered by various CLEC executives and network engineers, of course, have put a lie to the *UNE Fact Report*'s undocumented speculations.[28]

26. CLECs often found it prohibitively expensive to connect buildings to their networks, even where they had fiber "lying within easy reach" of the specific location in question. Yet the *UNE Fact Report*'s figures for CLEC route miles of fiber and building connections presented out-of-context marketing and press material that rarely provided the information that is described in the *Fact Report* document, and as such cannot be relied upon as "fact" to provide a reasonable picture of CLEC network capabilities. For example, Table 2, Section III of the *Fact Report* purports to show the facilities available from "Fiber Wholesalers" including the MSAs served,

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28. See generally in record in WC Docket No. 04-313, *Tirado (XO)*; *Duke (KMC); Falveny (Xspedius)*; *Kunde (Eschelon)*; Declaration of Rebecca H. Sommi on Behalf of Broadview Networks, Inc., WC Docket No. 04-313, October 1, 2004 ("*Sommi (Broadview)*"); Declaration of Warren Brasselle on Behalf of Talk America Inc., WC Docket No. 04-313, October 1, 2004 ("*Brasselle (Talk America)*"); Declaration of Anthony Abate on Behalf of SNiP LiNK, LLC, WC Docket No. 04-313, October 1, 2004 ("*Abate (SNiP LiNK*"); Declaration of Dan J. Wigger on Behalf of Advanced Telecom, Inc., WC Docket No. 04-313, October 1, 2004 ("*Wigger (Advanced)*").

network miles and buildings connected directly with competitive fiber. An examination of the source documentation cited as the basis for the preparation of this table, however, uncovers numerous examples of misleading use of company statements. For example:

- AboveNet stated that it had 1.4 million metro fiber miles, which provides no information on actual route miles. Also, AboveNet's 1.4 million metro fiber miles were in major US markets as well as in London, England. An inspection of network maps for AboveNet's US vs. London markets indicates that a very significant portion of this fiber was *not* deployed in the US at all.[29]

- LightCore was a wholly owned subsidiary of CenturyTel – an ILEC – and apparently owned fiber facilities in CenturyTel's ILEC operating areas as well as areas in which the company operated as a CLEC.[30]

29. AboveNet Website, AboveNet Products and Services Resources, IP and Fiber Maps, http://www.above.net/products/maps.html (accessed October 15, 2004).

30. CenturyTel Website, Company Profile, Service Areas, http://www.centurytel.com/about/companyProfile/index.cfm (accessed October 15, 2004); LightCore Website, Network Map, http://www.lightcore.net/network_nm.php (accessed October 15, 2004).

- NEESCom/Gridcom stated that it "passes" 177 buildings, not that it had directly connected the buildings to its network.[31]

- Northeast Optic Network (NEON) indicated that, despite its metro fiber ring network, it does not usually provide local loops. NEON indicated that it

> can assist customers in three ways with the Local Loop: We will source it, buy it, and re-sell it to customers; Customers can source and buy it themselves and NEON will connect them; NEON will work with building managers or other real estate professionals to provide custom builds at specific, larger locations. NEON will consider providing Local Loop on an individual, case-by-case basis. Some of the criteria we assess include: how far is the customer's location off-network?; how much capacity is required?; and what are the customer's needs?[32]

- The NEON "Building List 2004" cited in Appendix H of the *UNE Fact Report* as a basis for its figure of 177 NEON "lit" buildings actually contains a list of NEON network facility locations, such as BOC Central Offices, and Common Carrier Access points and Nodes, both "planned" and "existing" – *none of these buildings are end user customer locations* – and, as noted above, NEON states that it does not provide end-user loop connectivity.[33]

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31. NEES Metro Rings Website, http://www.gridcom.com/neescom/prod_servc/metro/index.htm (accessed October 15, 2004).

32. NEON Website, Frequently Asked Questions, http://www.neoninc.com/ (accessed October 15, 2004).

33. NEON Communications Building List 2004, http://www.neoninc.com/ (Link accessible (continued...)

- The *UNE Fact Report* claimed that OnFiber is providing service at 1,000 on-net buildings. However, OnFiber stated that "the OnFiber network currently reaches or passes almost 1,000 commercial buildings and Points of Presence (POPs)."[34] "Passes" does not ordinarily mean "connected," and it is not at all clear as to what "reaches" meant. However, it would appear, at the very least, that the "facts" reported in the "Fact Report" are less than accurate.

27. The speculation and assumptions behind the "Network Miles" figures included in Tables 1, 2 and 3 of the *UNE Fact Report* fail to properly isolate local fiber miles. NEESCom/Gridcom, a "Fiber Wholesaler," states that its route miles are a combination of local and regional miles, consisting of both "regional backbone and expanding family of metro rings."[35] Progress Telecom, one of the utilities that the *Fact Report* identifies as a wholesale provider of local fiber, is cited as having 8,524 network miles. In fact, this network consists significantly of long haul

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33. (...continued)
from "Frequently Asked Questions" section of webpage, accessed October 15, 2004). Note that this building list indicates 145 existing buildings and 37 planned buildings.

34. OnFiber Press Release, *OnFiber Achieves Triple Digit Revenue Growth for Second Consecutive Year*, February 9, 2004, Available at, http://www.onfiber.com/interior.asp?section=press&page=press_release&release=pr040209 (accessed October 25, 2004).

35. NEESCom Website, "The NEESCom Edge," http://www.gridcom.com/neescom/edge/index.htm (accessed October 15, 2004).

fiber assets stretching from New York to Miami.[36] The *Fact Report* indicates that AGL Networks "installs more than 50,000 laterals and 750 miles of conduit per year."[37] In fact, since AGL only reports 235 route miles of fiber *altogether*, it seems rather unlikely that AGL Networks installs anywhere near 750 fiber route miles annually. AGL notes that "AGL Resources" *not* "AGL Networks" installs these laterals and conduit miles. AGL Resources is the parent company of AGL Networks, but also the parent of Atlanta Gas Light, Chattanooga Gas, Virginia Natural Gas, Georgia Natural Gas and Sequent Energy Management.[38] Despite the claims of the *Fact Report*, it is reasonable to assume that the vast majority of laterals and conduit laid by AGL does not include fiber, but rather is gas infrastructure. Likewise, Con Edison Communications and PPL Telcom note merely that their networks pass "within 2 city blocks" or "within a half mile" of the business location figures cited.[39] Finally, FPL FiberNet, far from having a network that, "reaches '2.2 million business lines in the state' of Florida" actually claims that its network, "crosses the service territories of the three major local telephone

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36. Progress Telecom Network Map, Progress Telecom Website, http://www.progresstelecom.com/pdf/Network%20Map.pdf (accessed October 15, 2004).

37. *UNE Fact Report*, at Table 3.

38. AGL Networks Website, Corporate Organization, http://www.aglnetworks.com/content/company/agln_ourcom_cororg.html?onImage=0&onImage=8 (accessed October 15, 2004).

39. *UNE Fact Report,* at Table 3.

companies in Florida, ultimately reaching 2.2 million business lines in the state" clearly *not* implying that it is already connected to all 2.2 million business lines in Florida.[40]

Transport

28. The *UNE Fact Report* asserts that "competitive entrance facilities are available, at a minimum, in every wire center where one or more competing carriers has collocated fiber-based transmission equipment."[41] The *Fact Report*'s authors cite the *Pricing Flexibility Order* to substantiate this claim, arguing that it holds that "fiber-based collocation provides strong indication of competitive entrance facility deployment."[42] But the *FACT Report* conveniently ignores the Commission's finding at para. 397 of the *TRO* that the mere existence of competitive entrance facilities is not evidence of non-impairment with respect to unbundled transport. There, the Commission found that identification of only one fiber-based collocation arrangement in a wire center was not sufficient for a finding of non-impairment. The Commission required that,

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40. *Id.*, at Table 3; Press Release, *FPL FiberNet, FPL FiberNet announces service availability in St. Petersburg metro*, September 24, 2001, available at: http://www.fplfibernet.com/news/contents/01126.shtml (accessed October 15, 2004).

41. *Id.*, at III-27.

42. *Id.*, at fn. 79, citing *Access Charge Reform,* CC Docket No. 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, CCB/CPD File No. 98-63; *Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157; *Fifth Report and Order and Further Notice of Proposed Rulemaking,* FCC No. 99-206, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*"), 14 FCC Rcd 14265, at para 81 (1999).

based upon a simple headcount of collocation, BOCs were required to show competitive facilities from three different CLECs. As the Commission explained

> 407. We set the number of competitive facilities at three for several reasons. First, we want to be assured that the route can support "multiple, competitive" transport networks. Second, setting the trigger at three competitive facilities allows for the possibility that some network owners may not be interested in providing wholesale services, in contrast with the wholesale availability trigger which counts only actual wholesalers. Third, due to the sunk nature of transmission facilities, facilities will remain on a route even if a competitive transport provider exits the market. Furthermore, we note that where, through the application of this trigger, impairment for unbundled transport at a particular capacity is no longer found, substantial competitive transport facilities, and perhaps other capacities of UNE transport will be available. Therefore, if this trigger removes unbundled transport at a particular capacity level, carriers will remain capable of serving end-user customers in all areas. This will provide certainty for new market entrants.[43]

Far from attempting to ascertain the availability of wholesale transport or presenting data for wire centers meeting the Commission's "three collocator" non-impairment test, the *Fact Report* instead presents Table 4, which purports to show the "Percentage of Wire Centers and Access Lines Served by One or More Fiber-Based CLEC Collocation Nodes." Far from confirming non-impairment, this Table actually demonstrates that competitive transport is certainly not available in a large number of RBOC wire centers. For example, only 13% of Verizon wire centers in the 25 largest MSAs (presumably areas with the most competitive transport activity) contain even *one* CLEC fiber-based collocation. The figures presented by other RBOCs are no closer to meeting the Commission's standards, with SBC showing 15% of wire centers and

43. *TRO*, 18 FCC Rcd 17231, footnotes omitted.

BellSouth showing 20% of wire centers containing one or more collocations.[44] Overall, the *Fact Report* claims that 16% of RBOC wire centers contain at least one fiber-based collocation. It is reasonable to assume that the percentage of wire centers containing *three* fiber-based collocation arrangements is significantly smaller, but of course this key metric is nowhere to be found in the *Fact Report.*[45] In any event, whatever count of collocations may have existed prior to the announcement of the SBC/AT&T and Verizon/MCI mergers, the numbers of qualifying collocations has now clearly diminished.

29. The *UNE Fact Report* authors claim

> ... competing carriers have already obtained fiber-based collocation in 16 percent of Bell company wire centers, which contain 47 percent of total access lines and 55 percent of total business lines. More than half of all BOC wire centers with 5,000 or more *business* lines now have fiber-based collocation. *See* Table 17. It is therefore reasonable to conclude that other wire centers that meet this criterion could economically support competitive fiber as well.[46]

No support whatsoever is advanced for this giant leap from what is to what might be. Indeed, sworn testimony by executives at a number of CLECs – individuals that unlike the authors of the

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44. Data for Qwest contains only the seven largest MSA, resulting in a significantly lower number of total wire centers and higher percentage of collocation.

45. The source data provided in the *UNE Fact Report* is insufficient to make this determination.

46. *UNE Fact Report*, at III-28.

Fact Report have had first-hand experience with the economic considerations and business decisions associated with network construction – belie the *UNE Fact Report*'s "facts."[47]

30. In fact, this RBOC claim is belied by the *UNE Fact Report*'s own Table 17. There, the *Fact Report* indicates that only about 53% of wire centers meeting this "5000 business lines" criterion (56% for Verizon, 40% for SBC, and 70% for BellSouth) actually contain collocation by at least one CLEC,[48] and as with Table 4, it is reasonable to assume that, if the *UNE Fact Report's* authors had included wire centers with *three* competitive collocations, the percentage of wire centers with viable competitive transport would be significantly smaller.

31. It is also noteworthy that Table 17 of the *UNE Fact Report* (presenting "Fiber Based Collocation in Wire Centers with 5,000 or More Business Lines") does not provide the percentage of total business lines included in those wire centers with 5,000 or more business lines. In its Table 4, the *Fact Report* contains not only the percentage of wire centers containing fiber-based collocation, but also the percentage of business lines and access lines served by those wire centers. These figures (55% of all business lines and 47% of total lines) are repeated

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47. See, generally, *Tirado (XO)*; *Falveny (Xspedius)*; *Kunde (Eschelon)*; *Sommi (Broadview)*; *Brasselle (Talk America)*; *Abate (SNiP LiNK)*; *Duke (KMC); Wigger (Advanced).*

48. Again, the data for Qwest contains only the seven largest MSAs, resulting in a significantly lower number of total wire centers and higher percentage of collocation. Though not noted, it can be assumed that, as with Table 4, the *UNE Fact Report's* authors only included wire centers in the 25 largest MSAs.

several times in the *Fact Report*'s text.[49] Table 17, containing data based upon the *Fact Report's* proposed standard of wire centers with 5,000 or more business lines, contains no such corollary figures, nor can such figures be extracted based upon the data provided. Instead, Table 17 appears to include only the percentage of wire centers with *both* more than 5,000 lines *and* CLEC fiber-based collocation.[50] This is not the relevant data the Commission needs to evaluate even under the *UNE Fact Report's* proposed 5,000 line standard. To evaluate impairment on the 5,000 business line per wire center level, the Commission would require, at a minimum, a business case showing that, for *all* wire centers with 5,000 or more business lines, competitive deployment by multiple (i.e., at least three) CLECs is economic. Given that, according to the *Fact Report*, not even one CLEC has chosen to collocate in nearly half of the wire centers the *Fact Report* indicates are addressable, the conclusion that such collocation is economically *possible* for *three* CLECs cannot withstand scrutiny.

32. In contrast to ILEC networks, the architecture of CLEC networks consist of interoffice transport facilities used *solely* to *extend subscriber loops* from the RBOC wire center associated

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49. *UNE Fact Report*, at III-7, III-29, III-31.

50. The exact contents of Table 17 are unclear, since the column heading explains that it contains the, "Percentage of Wire Centers with 5,000 or More Business Lines and Access Lines Served by These Wire Centers with One ore More Fiber-Based CLEC Collocation Nodes," yet the table contains only two columns, "# of Wire Centers" and "% of All WCs." Though unclear, I have assumed that the "# of Wire Centers" Column contains the number of wire centers with 5,000 or more business lines in the top 25 MSA (7 for Qwest) and the "% of All WCs" column contains the percentage of all wire centers in the 25 MSA (7 for Qwest) with 5,000 or more lines and CLEC Collocation Nodes. The Table does not appear to contain any percentages based upon access lines.

with the customer's premises to a point on the CLEC's network where connectivity can be efficiently achieved. As confirmed in the sworn testimony of a number of CLEC declarants described above, as well as in the October 4, 2004 declaration of AT&T witnesses Fea and Giovannucci in WC 04-313, CLEC networks do not require or provide point-to-point connectivity between individual pairs of ILEC wire centers, and as such no inference can be drawn that such transport using CLEC facilities is "possible" merely because a particular CLEC – or multiple CLECs – happen to maintain collocations at the wire centers in question.[51] Other than reiterating this same unsupported speculation as to what CLECs can "possibly" do with facilities in place, the *Fact Report* itself offers no "facts" that bear on this subject at all.

51. *Kunde (Eschelon)*, at para. 10; *Abate (SNiP LiNK)*, at paras. 11-12; *Tirado (XO)*, at para. 38.

SPECIAL ACCESS PRICE TRENDS

The RBOCs' contention that special access prices have decreased since the onset of pricing flexibility rests upon contrived and misleading "analyses" that substitute "average revenue" for actual prices.

33. Verizon, BellSouth and SBC have each introduced evidence purporting to support their claim that RBOC prices for special access services have decreased since the onset of special access pricing flexibility, and use that "evidence" to decry the need for any additional regulation or price caps, including imposition of an "X" factor.[52] In fact, however, *prices* for RBOC special access services – and particularly for the least competitive DS-n services – when compared on an "apples-to-apples" basis – have *increased*, in some cases by high double-digit percentages since the pricing flexibility "triggers" had been satisfied. This fact is amply documented in the comments of numerous parties in this proceeding.[53] However, even in those instances where the nominal price has remained unchanged, it is still higher than the currently effective price for the

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52. *BellSouth Initial Comments* at 13-23; *Verizon Initial Comments* at 5-8; Declaration of William E. Taylor on Behalf of Verizon, WC Docket No. 05-25, June 13, 2005 ("*Taylor WC 05-25, (Verizon)*") at paras. 13-45, *SBC Initial Comments* at 21-22, Declaration of Parley Casto on Behalf of SBC, WC Docket No. 05-25, June 13, 2005 ("*Casto WC 05-25, (Verizon)*") at para 54; Declaration of John C. Klick and Michael R. Baranowski on Behalf of SBC, WC Docket No. 05-25, June 13, 2005 ("*Klick and Baranowski WC 05-25, (Verizon)*") at para 51.

53. *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of the Ad Hoc Telecommunications Users Committee, filed June 13, 2005; "Competition in Access Markets: Reality or Illusion. A Proposal for Regulating Uncertain Markets ," Economics and Technology, Inc. (August 2004); *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of Sprint Corp, filed June 13, 2005.

same service provided by the same RBOC in non-pricing flexibility areas in which price cap rate adjustments are still required.

34. In claiming that special access prices have declined, Verizon, BellSouth and SBC rely upon broad averages and surrogates that *conceal*, rather than reflect, specific prices and price movements over the time period under examination. The RBOCs have been pushing this flawed data on regulators, in various iterations, for more than a year now. Dr. William E. Taylor, testifying initially for Verizon in WC 04-313, presented a contrived "analysis" that purported to show that special access prices have *decreased* under pricing flexibility.[54] Significantly, however, Dr. Taylor did not look at "prices" at all, focusing instead upon a surrogate – *average revenue per voice-grade equivalent (DS0) channel.* Changes in "average revenue per voice-grade equivalent ("VGE") channel" result from numerous factors – most notably changes in the *mix* of services actually being purchased – and it is not a valid indicator of "price."[55] In that same proceeding, SBC declarant Parley Casto testified that SBC's DS-1 special access rates had decreased by 11% since 2001, but conveniently ignored the fact that most of that apparent price

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54. *See*, Declaration of William E. Taylor Regarding Special Access Pricing on Behalf of Verizon, WC Docket No. 04-313, October 4, 2004 ("*Taylor WC 04-313 (Verizon)*"). *See also, Taylor WC 05-25, (Verizon).*

55. The *Taylor WC Docket No. 04-313 (Verizon)* testimony updated an earlier analysis by Kahn and Taylor submitted in the Commission's Special Access proceeding. Dr. Kahn, however, in testimony presented before the US Court of Appeals, refuted the validity of exactly this type of fixed weight average as presenting misleading results. See, Association of Oil Pipe Lines v. Federal Energy Regulatory Commission and the United State of America, 281F.3d 239, 243; 350 U.S.App.D.C. 132, 136. The newest Taylor analysis filed in this proceeding updates that data yet again.

drop resulted from mandatory annual rate reductions required by the Commission's price cap rules for services not subject to pricing flexibility.[56] It is noteworthy that although they both offer "average revenue" data once again, neither Verizon nor SBC has offered any *direct* comparisons of specific price movements over time, since had they done so the results would have put a lie to the RBOCs' claims that prices have been falling. BellSouth does proffer limited actual pricing analysis that documents that prices for DS-1 and DS-3 services in pricing flexibility areas have either remained constant or increased (in the case of month to month prices) since 2001. BellSouth's poorly labeled Tables in Attachment 1, however, fail to identify the fact that the prices in those tables are only for pricing flexibility services. While the price on the printed pricing flexibility tariff page may not have increased since 2001 for many elements, the prices being paid for actual individual special access circuits did increase for customers quite regularly as additional areas were granted pricing flexibility status. Each time an additional MSA was granted Phase II status, the lower non-pricing flexibility prices (omitted from BellSouth's tables) were replaced on customers' bills with the higher pricing flexibility prices.

Flaws in Dr. Taylor's "average revenue" analyses

35. As discussed above, the Taylor pricing analysis filed as part of Verizon's initial comments in this proceeding update earlier Taylor work. In order to understand all of the infirmities of Dr. Taylor's technique, it is best to start with his earlier analyses. In WC Docket

56. Declaration of Parley C. Casto on Behalf of SBC Communications, Inc., WC Docket No. 04-313, October 4, 2004 ("*Casto WC 04-313(SBC)*").

No. 04-313, Taylor filed an analysis designed to demonstrate that the average price for special access services had declined by 15.5%.[57] As a surrogate for "price" Taylor developed an average revenue per VGE (which, unfortunately, does not even remotely approach being an adequate surrogate for "price"). In analyzing Dr. Taylor's "evidence," I became aware that the decreases that Taylor was documenting were less than what would have been required under the FCC price caps plan at the time. In fact, Verizon, BellSouth and SBC have all commingled price movements that were *required* under the Commission's price cap rules with RBOC-initiated price changes made following the onset of pricing flexibility. This was true in the initial filings made in WC 04-313 and RM-10593, and it remains true in the new filings in the instant proceeding as well.

36. A shown in Table 1 below, had the Commission's GDP-PI – 6.5% annual price cap rate adjustment rule been in effect for all special access services and for the periods since 1996 - 2003 (the period of Taylor's analysis) the "average" price decrease over the period would have been 28.5%, i.e., roughly *double* the 15.5% drop that Dr. Taylor had calculated in the analysis he proffered in WC-04-313.

57. Declaration of William E. Taylor Regarding Special Access Pricing on Behalf of Verizon, WC Docket No. 04-313, October 4, 2004 ("*Taylor WC 04-313(Verizon)*").

Table 1

Comparison of GDP-PI – 6.5% Annual Price Cap Rate Adjustment with Average Revenue per Special Access VGE per ARMIS 43-03

Year	GDP-PI	ΔGDP-PI – 6.5%	Price cap index	Avg. revenue per VGE index
1996	2.0	-4.5	100.0	100.0
1997	1.9	-4.6	95.5	104.4
1998	1.5	-5.0	91.1	101.7
1999	1.1	-.54	86.6	91.4
2000	1.6	-4.9	81.9	90.5
2001	2.2	-4.3	77.9	95.9
2002	2.4	-4.1	74.5	86.3
2003	1.4	-5.1	71.5	84.6

As this calculation demonstrates, and assuming that the average revenue per VGE is representative of the "price" of special access as Dr. Taylor contends, under price caps the 2003 special access price index would have been 71.4 instead of the 84.5 calculated using Dr. Taylor's formulation. On this basis, special access average revenues *as implemented by the RBOCs using pricing flexibility and other pre-pricing flexibility adjustments* were roughly 18.35% *higher* than they would have been through a straight application of the Commission's price cap formula over the full seven-year period.

37. This outcome is hardly surprising. Even in the "pricing flexibility" areas, the actual extent of facilities-based competition for RBOC special access services is clearly not sufficient to constrain RBOC pricing. Indeed, in the *TRO*, the Commission recognized that mere satisfaction of the pricing flexibility trigger was not indicative of the sufficiency of competition in any MSA

> ... The record indicates that incumbent LECs have qualified for special access pricing flexibility in numerous MSAs throughout their regions, almost exclusively by meeting the triggers based on special access revenues. Because the revenue trigger requires only a single collocated competitor and the purchase of substantial amounts of special access in a concentrated area, this test provides little indication that competitors have self-deployed alternative facilities, or are not impaired outside of a few highly concentrated wire centers. Additionally, the pricing flexibility trigger based on alternative transport-based collocation requires no consideration of the ubiquity of the competitive transport facilities throughout an MSA. The measure does not indicate that the competitive fiber facilities connect to collocations in any other incumbent LEC central offices. The measure may only indicate that numerous carriers have provisioned fiber from their switch to a single collocation rather than indicating that transport has been provisioned to transport traffic between incumbent LEC central offices. Therefore, we find that Commission approval for special access pricing flexibility, finding that competing carriers have made "irreversible sunk investments," is not sufficiently tailored to identify where requesting carriers are not impaired without unbundled transport.[58]

38. When examined on an apples-to-apples basis over the period since the onset of pricing flexibility, special access prices have either increased or remained the same in nominal dollar terms while corresponding prices in areas not eligible for pricing flexibility have decreased. This undeniable *fact* is obscured by the unrepresentative "average revenue" index that Dr. Taylor has creatively elected to develop.

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58. *TRO*, at para. 397, footnotes omitted.

39. There is, in reality, no inconsistency between an *apparent* decrease in "average revenue per voice-grade equivalent (DS0) channel" and the persistent *increases* in price for the specific DSn-level special access services at issue here. There are at least three explanations for this result, none of which have been explored in any detail by Dr. Taylor:

(1) Disproportionate increase in demand for very high capacity OCn services whose price, when expressed on a per voice-grade equivalent ("VGE") basis, is substantially lower than the per-VGE price for services purchased as DS-1s or DS-3s;

(2) Increased use of optional pricing plan ("OPP") contracts that impose substantial volume and term commitments, coupled with large financial penalties, in exchange for "discounts" off the prevailing month-to-month pricing; and

(3) Inclusion of special access rate decreases resulting from annual price cap rate adjustments for services not subject to pricing flexibility in the "average revenue" figure.

As a result, the *apparent* decrease in *average* revenue per voice grade equivalent channel as reported by Dr. Taylor is in no realistic sense indicative of any "price decreases," and to claim as much is misleading and dishonest. Dr. Taylor's subsequent updates to his analyses have done nothing to move away from the "average revenue" basis. The Commission should ignore and afford no weight or credence whatsoever to Dr. Taylor's analysis.

Use of "average revenue per voice grade equivalent" rather than actual prices.

40. Dr. Taylor's comparison is cast in terms of "average revenue per voice grade equivalent" ("VGE") special access service. However, that is distinctly *not* how special access services are priced or sold. Special access services are denominated in terms of multiple pricing dimensions and other service attributes including, among other things, bandwidth (capacity) and distance. Bandwidths range from single voice-grade analog or digital (DS0) channels up through an OC-192 "pipe," which is equivalent to 129,024 VGE channels. Because prices vary less than proportionately with total bandwidth, when expressed on a VGE basis, the price per VGE channel decreases as the total capacity of the "pipe" increases. For example, an OC-12 facility, which is equivalent to 8,064 voice-grade (DS-0) channels or 336 DS-1s, is typically priced at only about 40 times the price of a single DS-1. Thus, when purchased as part of an OC-12, the price of a single VGE channel is only 12% of the per-channel price when purchased as part of a DS-1. In recent years, and when viewed in terms of the entire special access universe, the demand for very high capacity OCn services has been growing at a much faster rate than the demand for individual DS-1s or DS-3s, driven in large part by the voracious capacity demands of the Internet and other high volume data transmission applications. Thus, even if prices of specific services had remained unchanged, the average "revenue per VGE channel" would fall, because successively larger percentages of voice-grade equivalent channels are being purchased as part of very high capacity OCn services.[59]

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59. For example, suppose that an ILEC provides special access only as DS0s and DS-1s. In (continued...)

41. Along a similar line, it is also possible that the average distance of special access services may also have decreased,[60] in which case (and, once again, holding all else equal), the price per VGE would decrease simply because average distance per circuit has gone down, rather than due to any change in any specific pricing element. Dr. Taylor's analysis entirely ignores this possibility.

Increased use of "optional pricing plan" volume and term contracts.

42. Since obtaining special access pricing flexibility in most MSAs, the RBOCs have been increasing month-to-month prices while at the same time have offered discounts off those prices in exchange for certain volume and term commitments on the part of the special access customer (the IXC or CLEC) along with the acceptance of a potential obligation on the part of the customer to incur a financial penalty if these commitments are not fully satisfied. As AT&T declarants Benway *et al* testified in their October 4, 2004 submission in WC 04-313, the specific terms of such OPP and similar contracts are often extremely onerous, and among other things require the customer to forgo alternatives, in the minority of routes where such alternatives may

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59. (...continued)
Period 1, the *price* of a DS0 was $50 and the *price* of a DS-1 was $600 (i.e., $25 per VGE), and that 20% of all VGEs are provided as DS0s, for an average revenue per VGE of $30. In Period 2, suppose that the price of a DS0 increases to $52 and the price of a DS-1 increases to $624, but that now only 10% of all VGEs are provided as DS0s, resulting in an average revenue per VGE of $28.60. Thus, despite *rising prices*, the shift in demand to higher capacity services results in a *lower* average revenue per VGE.

60. Comments of MCI, Inc., WC Docket No. 04-313, October 4, 2004, at 170-171.

exist, in order to fulfill the committed volume. This increased use of so-called OPPs with fixed volume and term commitments in exchange for "discounts" off the RBOC month-to-month rates invalidates any attempt simplistically to track "average revenue" over time, because such a comparison obscures major elements of the "price" that the RBOCs are actually demanding.[61]

43. The "price" of a good or service consists of the total opportunity cost confronting the purchaser, and as such consists of all elements of "value" given in exchange for it, which would include both nominal cash payments as well as any non-cash restrictions, obligations, commitments and risks that the purchaser is required to accept. Comparing a month-to-month price of $100 with an OPP price of $80 that requires a minimum purchase of $10-million over a five-year period ascribes zero value to that commitment, to the potential for a financial penalty if the commitment is ultimately not satisfied, or to the opportunity losses confronted by the customer where, in order to satisfy the volume commitment, potentially lower-priced alternatives may have to be forgone.

Inclusion of annual price cap rate decreases for non-pricing flexibility services.

61. Declaration of Alan G. Benway, Robert G. Holleron, Jeffrey King, Michael E. Lesher, Michael C. Mullan, and Maureen Swift on behalf of AT&T Corp., WC Docket No. 04-313, October 4, 2004 ("*Benway et al Declaration*"), at paras. 41-42, 54-61.

44. In fact, taking into account required price cap reductions, the results of Dr. Taylor's WC 04-313 figures showed that rates subject to pricing flexibility had actually *increased.* While Dr. Taylor's calculation of average revenue per VGE, as reflected on his Figures 1 and 2 of his WC 04-313 filing, show pricing flexibility as commencing in mid-2000, many RBOC MSAs had not been granted pricing flexibility until 2002, and even today some MSAs – and non-MSA areas – are still subject to price caps. Consequently, a portion of the drop in average revenue per VGE that Dr. Taylor sought to ascribe to the post-pricing flexibility period were actually the result of *mandatory* annual price cap rate reductions.[62] For these areas, prices have decreased by approximately 19.53% between mid-2000 and those in effect as of this date.[63]

45. According to the ARMIS 43-03 reports upon which Dr. Taylor based his average revenue per special access voice grade equivalent channel, average revenue per VGE had an index value of 84.5 as of the end of 2003 (1996 = 100), implying a *total decrease* in nominal dollars of 15.5% over the full 7-year period. As I noted earlier, had the GDP-PI – 6.5% annual price cap rate adjustment been operative for all special access services over the entire period, the

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62. For example, SBC Declarant Parley C. Casto, at para. 16, footnote 2, admits that "[t]o be sure, some of SBC's Phase II special access rates in pricing flexibility areas are slightly higher than in those non-pricing flexibility areas. This results from rate reductions in non-flexible rate areas due to the annual price cap reductions dictated by the Federal rules which do not apply to pricing flexibility areas. ..."

63. The Price Cap index as show in Table 1 is 86.6 in 1999, 81.9 in 2000, and 67.8 in 2004. The mid-2000 index value, as an average is (86.6+81.9)/2=84.25. The percentage change is calculated by subtracting the 2004 value from the mid-2000 value, and dividing by the mid-2000 value. (84.25-67.8)/84.25=19.53

index value for 2003 would have been 71.5, indicating a cumulative 28.5% drop in average revenue per VGE over the 1996-2003 period, all else being equal.

Shifting utilization between lower and higher capacity facilities accounts for the remaining decrease in VGE special access revenue.

46. Shifting utilization of services with different capacity levels or different mixes of channel terminations and mileage is also responsible for some of the changes in "average revenue" results. Importantly, there is no reason why this revenue surrogate for *price* was needed: If, as Verizon claims, its special access prices have been dropping since the onset of pricing flexibility, it should have been able to show that via a direct like-for-like comparison of actual tariff prices at various points in time, rather than by means of the indirect – and inapposite – device of an "average revenue" surrogate. Of course, that type of comparison would *disprove* Verizon's claim, so it is hardly surprising that Dr. Taylor needed to devise this "smoke and mirrors" approach to "proving" what is in fact not true.

47. If, over time, proportionately more VGE channels are provided in very high capacity OCn "pipes," all else being equal the "average revenue per VGE" will decrease – even if the nominal "prices" of like-for-like services themselves are increasing.

Dr. Taylor's removal of DSL revenues from special access category revenues as reported in ARMIS is flawed and is based upon undocumented and unreproducible data.

48. In describing the newest iteration of his series of flawed average revenue calculations, Dr. Taylor attempts to correct for a problem that he perceives stems from the fact that ARMIS data includes DSL revenue but not DSL lines, thus, he believes overstating the growth in revenue per line during periods when DSL revenue was growing rapidly."[64] Dr. Taylor testifies that he obtained DSL revenue from Verizon for 2002-2004 [and] "then subtracted these DSL revenues from ARMIS special access revenue" and divided the difference by VGEs to come up with what he apparently believes is a "better" VGE- based analysis.[65] The results of this new analysis, compared to a price caps *trend line* are shown on Figure 1 of Dr. Taylor's declaration in this proceeding. Like Dr. Taylor's prior analyses, the new Figure 1 is flawed.

49. First, without the actual DSL revenue or a citation to its source, there is simply no way to reproduce or verify any of Dr. Taylor's "DSL" calculations. Moreover, not all of Verizon's DSL-related revenue is included in the interstate special access category. Some DSL services are provided as "line sharing" UNEs, and some are provided to end users as part of Internet service bundles. As such, if Dr. Taylor removed *all* Verizon DSL-related revenue from the interstate special access category revenues reported in ARMIS, he may well have "removed" revenues that were not even there to begin with. The results being claimed by Dr. Taylor – larger percentage

64. Taylor Reply Declaration, at para. 7.

65. *Taylor WC 05-25 (Verizon)*, at para 18.

reductions in (non-DSL) special access revenues than for the category as a whole – could well be explained by this error. The embellishment of Dr. Taylor's analysis to exclude what purports to be DSL revenues cannot be reproduced and, in any event, has been applied to baseline figures that are themselves demonstrably wrong. Accordingly, the DSL adjustments cannot reasonably be afforded weight or relevance.

50. *First*, there is no logical relationship between average revenues per special access VGE and special access price changes. In fact, average revenues per special access VGE can decline even as special access prices increase. There are several reasons why this might occur. The Bells sell special access upon different terms and conditions. Customers that agree to the extra economic burdens entailed by the lengthy term and volume commitments in Bell OPPs can purchase special access at prices lower than the prices the Bells charge for month-to-month rates Thus, if the Bells increase month-to-month rates (as they have) that will cause more customers to knuckle under to the conditions in the Bell OPPs (as they have). This mere relative shift in demand will cause a decrease in average revenues per VGE – but there indisputably is *no decrease* in price.[66]

51. *Second*, the ARMIS data upon which the analysis relies does not segregate revenues earned in pricing flexibility and non-pricing flexibility MSAs. That is critical because the Bells

66. Indeed, an analysis that properly accounted for the economic "cost" of the assumed volume and term commitments could well show an economic rate increase.

have been forced to lower prices in areas where they remain subject to price caps. These required reductions may cause a drop in overall average revenues per VGE, but in no way show that the RBOCs have lowered prices in areas where they have pricing flexibility.

52. *Third*, average revenue per VGE (or DS-1, or DS-3) depends directly upon the *length* of the circuits that the RBOCs sell. Special access has fixed charges and mileage sensitive charges. The longer the special access circuit, all else equal, the higher the charge for the circuit. Thus, if there is a relative shift over time in special access demand from longer to shorter circuits, that would manifest itself as a reduction in average revenues per VGE (or DS-1 or DS-3) even where there had been no decrease in price.

53. *Fourth*, the average revenue per VGE metric treats mere shifts in the mix of special access purchased as a price decrease. The RBOCs earn higher revenues per VGE on lower capacity special access services than they do on higher capacity services For example, the revenue per VGE of an OC 12 service is much lower than the revenue per VGE of DS-1 service. If there is greater growth in purchases of higher capacity services than of lower capacity services, this would cause a decline in average revenues per VGE even where there had been no price decrease (or indeed, even where there have been price increases).

BellSouth's analysis of "declines" in average special access prices is misleading and flawed.

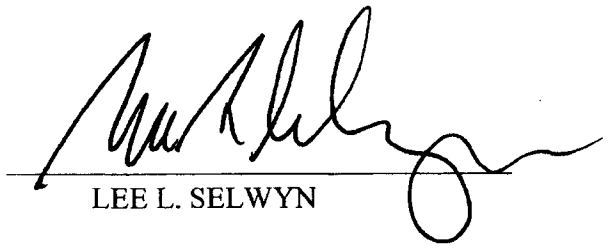
54. Taken at face value, BellSouth's new analysis does not offer much in the way of useful information. Rather than continuing to base its case on an overall average, BellSouth's present analysis calculates DS-1 and DS-3 specific revenues separately. This "analysis" of DS-1and DS-3 specific revenues suffers from many of the same problems as all of the other RBOC analyses I have discussed so far. No explanation is provided as to where they obtained DS-1 ad DS-3 revenues and line counts (such data are not reported in ARMIS) or even what the aggregate numbers were so that one could at least double check the math. Appendix 3 contains and analysis of the "average" DS-1 revenue per DS-1 circuit and the "average" DS-3 revenue per DS-3 circuit – an analysis fraught with all the same problems as the other "average revenue per unit" analyses. Similarly flawed Appendix 5 includes an analysis of the "average revenue per DS-1 equivalent." Among the most fundamental of the problems with these analyses are the following: (i) they inappropriately treat mere shifts in relative demand for month-to-month versus more burdensome term services as reflecting price changes, (ii) they inappropriately combine price changes for price capped special access services with pricing flexibility services and interpret price decreases in special access services subject to price caps as price decreases for services for which the BellSouth has pricing flexibility; and (iii) they inappropriately treat mere relative shifts in demand for circuit-mileage as price changes.

55. Additionally, the data is not ARMIS-based and cannot be traced to anything. The data upon which the analysis is based in inexplicably labeled as "excluding wireless" and represents

only about 50% of BellSouth's total ARMIS-reported special access revenues. No reason for removing "wireless" local channels, circuits, or revenues is proffered, nor is there any certainty that the "average revenues" provided as a result of this analysis track in any way to the average revenues for the totality of DS-1s and DS-3s. No weight can be given to this smoke and mirrors.

VERIFICATION

The foregoing statements are true and correct to the best of my knowledge, information and belief.



LEE L. SELWYN

Attachment 1

Statement of Qualifications

Dr. Lee L. Selwyn

ECONOMICS AND
TECHNOLOGY, INC.

Statement of Qualifications

LEE L. SELWYN

Dr. Lee L. Selwyn has been actively involved in the telecommunications field for more than thirty-five years, and is an internationally recognized authority on telecommunications regulation, economics and public policy. Dr. Selwyn founded the firm of Economics and Technology, Inc. in 1972, and has served as its President since that date. He received his Ph.D. degree from the Alfred P. Sloan School of Management at the Massachusetts Institute of Technology. He also holds a Master of Science degree in Industrial Management from MIT and a Bachelor of Arts degree with honors in Economics from Queens College of the City University of New York.

Dr. Selwyn has testified as an expert on rate design, service cost analysis, form of regulation, and other telecommunications policy issues in telecommunications regulatory proceedings before some forty state commissions, the Federal Communications Commission and the Canadian Radio-television and Telecommunications Commission, among others. He has appeared as a witness on behalf of commercial organizations, non-profit institutions, as well as local, state and federal government authorities responsible for telecommunications regulation and consumer advocacy.

He has served or is now serving as a consultant to numerous state utilities commissions including those in Arizona, Minnesota, Kansas, Kentucky, the District of Columbia, Connecticut, California, Delaware, Maine, Massachusetts, New Hampshire, Vermont, New Mexico, Wisconsin and Washington State, the Office of Telecommunications Policy (Executive Office of the President), the National Telecommunications and Information Administration, the Federal Communications Commission, the Canadian Radio-television and Telecommunications Commission, the United Kingdom Office of Telecommunications, and the Secretaria de Comunicaciones y Transportes of the Republic of Mexico. He has also served as an advisor on telecommunications regulatory matters to the International Communications Association and the Ad Hoc Telecommunications Users Committee, as well as to a number of major corporate telecommunications users, information services providers, paging and cellular carriers, and specialized access services carriers.

Dr. Selwyn has presented testimony as an invited witness before the U.S. House of Representatives Subcommittee on Telecommunications, Consumer Protection and Finance and before the U.S. Senate Judiciary Committee, on subjects dealing with restructuring and deregulation of portions of the telecommunications industry.

In 1970, he was awarded a Post-Doctoral Research Grant in Public Utility Economics under a program sponsored by the American Telephone and Telegraph Company, to conduct research on the economic effects of telephone rate structures upon the computer time sharing industry. This work was conducted at Harvard University's Program on Technology and Society, where he was appointed as a Research Associate. Dr. Selwyn was also a member of the faculty at the College of Business Administration at Boston University from 1968 until 1973, where he taught courses in economics, finance and management information systems.

Dr. Selwyn has been an invited speaker at numerous seminars and conferences on telecommunications regulation and policy, including meetings and workshops sponsored by the National Telecommunications and Information Administration, the National Association of Regulatory Utility Commissioners, the U.S. General Services Administration, the Institute of Public Utilities at Michigan State University, the National Regulatory Research Institute at Ohio State University, the Harvard University Program on Information Resources Policy, the Columbia University Institute for Tele-Information, the International Communications Association, the Tele-Communications Association, the Western Conference of Public Service Commissioners, at the New England, Mid-America, Southern and Western regional PUC/PSC conferences, as well as at numerous conferences and workshops sponsored by individual regulatory agencies.

Dr. Selwyn has presented testimony in cases addressing each of the five previous RBOC mergers. He appeared on behalf of the California PUC's Office of Ratepayer Advocates in both the SBC/Pacific Telesis and the Bell Atlantic/GTE merger dockets. That work included, among other things, analyses of the effect of the mergers on competition and on the surviving firms' market power, ratepayer impacts, including the applicants' recovery of merger-related costs and the flow-through of merger benefits to California ratepayers, and the conformance of the mergers with applicable California Public Utility Code requirements. Dr. Selwyn was engaged in 1996 by the State of Maine Office of Public Advocate with respect to the NYNEX/Bell Atlantic merger, in 1998 by the State of Connecticut Office of Consumer Counsel to address the merger of the Southern New England Telephone Company ("SNET") into SBC, and in 1998-99 by the Illinois Attorney General to present testimony in the Illinois Commerce Commission's proceeding regarding the merger of SBC and Ameritech.

Dr. Selwyn has also participated in a number of matters addressing non-merger change of control and other affiliate transaction issues. He was engaged by the California PUC Office of Ratepayer Advocates in 1992-1993 with respect to the Pacific Telesis "spin-off" of its cellular and other wireless subsidiaries. In 2003, Dr. Selwyn testified for the Staff of the Washington State Utilities and Transportation Commission addressing financial and public interest issues arising from Qwest's sale of its directory publishing business ("DEX") to a group of private investors. Dr. Selwyn has also been involved in numerous other cases addressing intercarrier compensation, interconnection, access charges, imputation, competition, and market power issues, including a number of Section 271/272 proceedings, and the FCC's *Triennial Review* and *Triennial Review Remand* proceedings.

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EXHIBIT 8

RBOC Volume Commitment Plan Examples

Verizon Commitment Discount Plan ("CDP")

Service:	Channel Terminations. Special/Switched DS1, DS3, DS0, Optical Entrance Facility
Discount:	Can move existing circuits into lower-priced tariffed Term Payment Plans.
Commitment Required:	Combined Special/Switched DS1 – 90% of in-service combined special/switched DS1 circuits throughout territory Combined Special/Switched DS3 – 90% of in-service combined special/switched circuits throughout territory
Term:	2-7 years
Geographic Area:	Discounted services available throughout territory
Other Conditions:	(a) Termination liability and penalties for failure to meet volume requirements

SBC Managed Volume Plan ("MVP")

Service:	DS1, DS3, Entrance Facilities, Switched Transport, Voice Grade
Discount:	(a) Year 1 – 9%; Year 2 – 11%; Year 3 – 12%; Year 4 – 13%; Year 5 – 14% off already-discounted rates (b) No NRCs on initial installation for 3 year or higher contracts
Commitment Required:	(a) Minimum Annual Revenue Commitment (MARC) – 4 times the recurring billing amount for past 3 months. MARC cannot be decreased. (b) Minimum $10 million in annual billing.
Term:	5 Years
Geographic Area:	Generally available throughout SBC territory
Other Conditions:	(a) Termination liability and penalties for failure to meet volume requirements (b) Ratio of access services bought to other wholesale (e.g., UNE) services bought must be higher than 95%

SWBT Contract Tariff # 48 (Same as PacBell #56, Ameritech #64 and SNET #16)

Service:	Special Access DS0, DS1/DS3, OC3, OC Dedicated Ring, Gigabit Ethernet and Multi-service Optical Network services
Discount:	5-12% discounts on SWBT price flex services; NRCs waived; SLAs
Commitment Required	(a) $26.5 million of contributory services from all regions or 4 times billing revenue for past 3 months, whichever is greater (b) Contributory Services include all Services (above) plus ATM, Frame Relay, InterLATA dedicated services, and others from throughout SBC
Term:	5 years
Geographic Area:	Price Flex areas of SWBT territory
Other conditions:	(a) Ratio of access services to other wholesale – e.g., UNEs) of 98% (b) Must subscribe to Ameritech #64, PacBell#56 and SNET#16. These contracts are virtually identical. (c) Cannot use in conjunction with MVP Plan.

BellSouth Premium Service Incentive Plan ("PSIP")

Service:	Special and switched DS1 and DS3 local and interoffice channels, DS0, WATS Access, SMARTRing, Managed Network, Wavelength
Discount:	(a) Credit of 6-10% for meeting revenue commitments. (b) Additional discounts of up to 50% off month-to-month rates and up to 19% off discounted rates depending on post-credit revenue level.
Commitment Required	(a) 90-95% of most recent 6 months of qualified revenue (which excludes NRCs) (b) Contributory Services include all Services (above) from throughout BellSouth
Term:	3 years
Geographic Area:	Generally available throughout BellSouth territory
Other conditions:	(a) Termination liability and penalties for failure to meet volume requirements